123-5-42

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~600~~ 600—326 51

JOSEPH TEAL, HENRY COLEMAN, JOHN Y. TODD, AND JOHN S. STORRS, PARTNERS AS J. TEAL AND COMPANY, PLAINTIFFS IN ERROR,

vs.

JOHN S. BILBY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED SEPTEMBER 29, 1884.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 969.

JOSEPH TEAL, HENRY COLEMAN, JOHN Y. TODD, AND JOHN S. STORRS, PARTNERS AS J. TEAL AND COMPANY, PLAINTIFFS IN ERROR,

vs.

JOHN S. BILBY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

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1 UNITED STATES OF AMERICA, *sct.:*

The President of the United States to the judges of the circuit court of the United States for the western division of the western district of Missouri, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Joseph Teal, Henry Coleman, John Y. Todd, and John S. Stores, and John S. Bilby, a manifest error hath happened, to the great damage of the said Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States at Washington, D. C., together with this writ, so that you have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court.

Issued at office in Kansas City, this eighteenth day of June, A. D. 1884.

[SEAL.] H. C. GEISBERG, *Clerk*,
By WARREN WATSON, *D. C.*

Approved.
A. KREKEL, *Judge.*

2 WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *sct.:*

I do hereby return due and perfect obedience to the within writ, and do herewith, under the seal of said circuit court, distinctly and openly send the record and proceedings aforesaid, with all things concerning the same.

Witness my hand as clerk and the seal of said court. Issued at office in Kansas City, this 25th day of July, A. D. 1884.

H. C. GEISBERG, *Clerk*,
By WARREN WATSON, *Deputy Clerk.*

[Endorsed:] 405. United States circuit court, western district of Missouri, western division. Joseph Teal *et al. vs.* John S. Bilby. Writ of error. Filed June 18th, 1884. H. C. Geisberg, clerk.

3 The United States of America to John S. Bilby, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the second Monday of October next, pursurnt to a writ of error, filed in the clerk's office of the circuit court of the *of the* United

States for the western division of the western district of Missouri, wherein Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs, copartners, trading and doing business under the firm name of J. Teal & Co., are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Arnold Krekel, judge of the circuit court of the United States for the western division of the western district of Missouri, this 18th day of June, in the year of our Lord one thousand eight hundred and eighty-four.

A. KREKEL, *Judge.*

4 UNITED STATES OF AMERICA, }
Western District of Missouri, Western Division, } *ss:*

Mr. T. C. Williams, being duly sworn, says: That he duly served the within citation, this 19th day of June, A. D. 1884, by delivering a true copy thereof to William Warner and O. H. Dean, attorneys for defendant in error, at Kansas City, Missouri, in said district.

M. T. C. WILLIAMS.

Subscribed & sworn to before me, this 19th day of June, 1884.

WARREN WATSON,
Com'r U. S. Circuit Court, Western District of Mo.

[Endorsed:] 405. United States circuit court, western district of Missouri, western division. Joseph Teal *et als. vs.* John S. Bilby. Citation. Filed June 18th, 1884. H. C. Geisberg, clerk.

5 UNITED STATES OF AMERICA, *sct.:*

Pleas and proceedings had before the circuit court of the United States for the western division of the western district of Missouri, in the case of Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs, (copartners, trading and doing business under the firm name of J. Teal & Co.,) plaintiffs, against John S. Bilby, defendant. At law.

Be it remember that heretofore, to wit, on Thursday, the first day of December, A. D. 1881, in vacation of said court, proceedings were had before the clerk according to the statute in such case provided, and entered of record in said cause, to wit:

JOSEPH TEAL *et al., against* JOHN S. BILBY.

This day came the plaintiffs, by their attorneys, Edwards & Ramsey, Woodson & Crosby, and L. H. Waters, and file petition and affidavit in the above-entitled cause, and the premises having been duly considered by the clerk, it is hereby ordered that the above-named defendant, John S. Bilby, and his agents, attorneys, and servants, deliver to the marshal of the United States for the western district of Missouri, the chattles and property specified in the affida-

vit filed with the petition in the above-entitled cause, and described as follows, to wit: Fifteen hundred head of cattle, which are steers, and are severally branded on the left side with the letter "T"
6 all of which are in the western division of the western district of Missouri, and which property is of the value of seventy-five thousand dollars, and if said defendant does not deliver said property in obedience to said order, the marshal aforesaid is hereby ordered to take said property from the possession of the defendant and deliver the same to the plaintiffs.

And the said petition is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, of the May Term, A. D. 1882.

JOSEPH TEAL, HENRY COLEMAN, JOHN Y. TODD, and JOHN S. STORRS, Copartners, Trading and doing Business under the firm name of J. Teal & Co., Plaintiffs,

vs.

JOHN S. BILBY, Defendant.

The plaintiffs, Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs, copartners, trading and doing business under the name, firm, and style of J. Teal & Co., state that they and each of them are citizens of the State of Oregon, and that defendant, John S. Bilby, is a citizen of the western division of the western district of Missouri. And the said plaintiffs further state that they are owners of, and entitled to the possession of, the following specific personal property, viz:

7 Fifteen hundred head of cattle, each and all of which said cattle are steers, and are branded on the left side with a letter T, and which cattle are of the value of, seventy-five thousand dollars.

And plaintiffs state that said defendant at and within said western division of the western district of Missouri wrongfully retains said cattle from the plaintiffs.

The plaintiffs therefore ask judgment for the recovery of said property, and twenty-five thousand dollars damages for the detention thereof.

EDWARDS & RAMSEY,
WOODSON & CROSBY,
L. H. WATERS,
Plaintiffs' Attorneys.

And the said affidavit is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri. Of the May Term, A. D. 1882.

JOSEPH TEAL, HENRY COLEMAN, JOHN Y. TODD, and JOHN S. STORRS, Copartners, trading and doing business under the firm name of J. Teal & Co., Plaintiffs,

vs.

JOHN S. BILBY, Defendant.

Joseph Teal, one of the above-named plaintiffs, being first duly

sworn on his oath, states that the plaintiffs in the above-entitled cause are citizens of the State of Oregon, and are the owners of and entitled to the possession of certain specific personal property, viz:

8 Fifteen hundred head of cattle, which said cattle are steers, and are severally branded on the left side with a letter T, and that the value of said cattle is seventy-five thousand dollars; and affiant further states that said cattle are wrongfully detained at and within the said western division of the western district of Missouri by the said defendant, who is a citizen of said division and district. And affiant further states that the said cattle have not been seized under any process, execution, or attachment against the property of said plaintiffs, and that plaintiffs will be in danger of losing their said property unless it be taken out of the possession of the defendant or otherwise secured.

JOSEPH TEAL.

Subscribed and sworn to before me this 1st day of December, 1881.

L. E. WYNE,
Commissioner of U. S. Circuit Court, West. Dist. of Mo.

And upon the filing of said petition a writ of summons was issued in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *sct:*

The President of the United States of America to the Marshal of the United States for the Western District of Missouri, Greeting:

You are hereby commanded to summon John S. Bilby, a citizen of the State of Missouri, and a resident of the western divi-
9 sion of the western district thereof, to be and appear before the honorable circuit court of the United States in and for the western division of the western district of Missouri on the first day of the next term thereof, to be begun and holden at the city of Kansas, in said district, on the third Monday, the 15th day of May next, then and there to answer the complaint of Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs, citizens of the State of Oregon, as set forth in the petition filed in the office of the clerk of said court on the 1st day of December, A. D. one thousand eight hundred and eighty-one.

Hereof fail not, and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the first day of December, A. D. eighteen hundred and eighty-one.

Issued at office, in the city of Kansas in said district, under the seal of said court, the day and year last aforesaid.

H. G. GEISBERG,
Clerk of said Court,
By WARREN WATSON,
Deputy Clerk.

Which said writ of summons was afterwards returned into said court with the marshal's return of service endorsed thereon as follows, to wit:

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *sct:*

I do hereby certify that I served the within writ by delivering a true copy thereof, together with a certified copy of the petition filed in the cause to John S. Bilby, the within-named defendant at Dawson, in Nodaway county, Mo. Done in the western division, western district of Missouri, this 3d day of December, 1881.

C. C. ALLEN,
U. S. Marshal, Western District of Mo.,
By R. M. ELLIOTT, *Deputy.*

And together with the writ of summons in said cause there was issued and delivered to the marshal a certified copy of the order of delivery, which said certified copy of the order of delivery, together with the marshal's return of service thereon, is in the words and figures as follows, to wit:

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, in Vacation, Thursday, December 1st, A. D. 1881. Before the Clerk.

JOSEPH TEAL, HENRY COLEMAN, JOHN Y. TODD, and JOHN S. STORRS, Copartners, trading and doing business under the firm name of J. Teal & Co., Plaintiffs,

vs.

JOHN S. BILBY, Defendant.

This day comes the plaintiffs by their attorneys, Edward & Ramsey, Woodson & Crosby, and L. H. Waters, and files petition and affidavit in the above-entitled cause; and the premises having been duly considered by the clerk, it is hereby ordered that the above-named defendant, John S. Bilby, and his agents, attorneys, and servants deliver to the marshal of the United States for the western district of Missouri the chattles and property specified in the affidavit filed with the petition in the above-entitled cause, and described as follows, to wit:

Fifteen hundred head of cattle, which are steers, and are several-y branded on the left side with a letter T, all of which is in the western division of the said western district of Missouri, and which property is of the value of seventy-five thousand dollars, and if said defendant does not deliver said property in obedience to said order, the marshal aforesaid is hereby ordered to take said property from the possession of said defendant and deliver the same to the plaintiffs.

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, } *sct:*

I, Henry C. Geisberg, clerk of the circuit court of the United States, in and for said division and district, do hereby certify that the foregoing writing is a true copy of the order of delivery in *in* the case of Joseph Teal *et al.* against John S. Bilby, as fully as the same remains on file in my office.

Witness my hand as clerk, and the seal of the court. Done at office in the city of Kansas, this 1st day of December, A. D. 1881.

H. C. GEISBERG, *Clerk,*
By WARREN WATSON,
Deputy Clerk.

I certify that I executed this order of delivery by taking
12 from the possession of the defendant, John B. Bilby twelve hundred and twenty-nine head of steers, as herein described, and delivered them into the possession of Henry Coleman, one of the plaintiffs in this cause of the firm of Joseph Teal & Co.

Done in the western division of the western district of Missouri this 7th day of December, 1881.

C. C. ALLEN, *U. S. Marshal,*
By R. M. ELLIOT, *Deputy.*

And afterwards, at the regular May term of said court, and on the 15th day of May, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *against* JOHN S. BILBY.

This day comes defendant, by Tichenor & Warner, his attorneys and files answer to the petition.

Said answer is in words and figures as follows, to wit:

In the United States Circuit Court of the Western Division of the Western District of Missouri.

JOSEPH TEAL, HENRY COLEMAN, JOHN Y. TODD, and JOHN S. STORRS,
Plaintiffs,
vs.
JOHN S. BILBY, Defendants.

Defendant for answer to plaintiffs' petition denies each and every allegation thereof, excepting as to his being a citizen of the State of Missouri, and as to his having been in possession of the property in controversy at the time of the commencement of this suit.

Wherefore he demands judgment.

13 WHITE & ALDERMAN AND
TICHENER & WARNER,
Attorneys for Defendant.

And afterwards at said regular October term, 1882, of said court,

and on the 27th day of October, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day a stipulation is filed herein that this cause shall not be called before the 11th day of December next.

Said stipulation is in words and figures as follows, to wit:

In the Circuit Court of the U. S. for the Western Division of the Western District of Missouri of the October Term, 1882.

JOSEPH TEAL *et al. vs.* JOHN S. BILBY.

It is agreed that in the two cases numbered respectively 405 and 409, wherein Teal *et al.* are plaintiffs and John S. Bilby is defendant, that said cases shall be set down for trial before the court and a jury on the 11th day of Dec., 1882; that before the present jury are discharged a jury shall be selected to try each case, and if the parties before then shall agree or the court order that both cases be tried together and before the same jury, and that the jury or juries
14 so selected shall be duly charged and required to appear Dec. 11th, 1882, to try said cases, and that in case any of said jurymen shall fail to appear on said day, that the court shall cause the pannel to be filled at once, and that the cases shall proceed to a trial.

Oct. 27th, 1882.

EDWARDS & RAMSEY AND
WATERS & WYNE,

_____ _____.

TICHENOR, WARNER & DEAN,
WHITE & ALDERMAN,
JOHNSTON & ANTHONY,
Att'ys for Def't.

And afterwards at the regular October term, 1882, of said court, and on the 13th day of November, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come the parties by their attorneys, the plaintiffs by Louis H. Waters, and the defendant by Tichenor & Warner, and it is thereupon ordered that a jury come, to wit, Samuel L. Fleming, George W. Shelley, John H. Myers, John Magee, Robert Lynn, M. E. Walter, Owen H. McGee, David H. Gay, W. W. Riggs, John G. Dryden, Peter Bear, William P. Fisher, twelve good and lawful men, who were charged to return and try the above-entitled cause at an adjourned session of the present term to be held on the 11th day of December next.

And afterwards at an adjourned day of the regular October term, 1882, of said court, and on the 11th day of December,
15 A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come the parties by their attorneys, the plaintiffs by Edward & Ramsey and L. H. Waters, and the defendant by
16 White & Alderman and Tichenor, Warner & Dean, and this case being regularly called for trial, it is ordered that a jury come, to wit, Samuel Fleming, John Magee, Robert Lynn, Owen H. Magee, George W. Shelly, John H. Myers, David H. Gay, W. W. Riggs, John H. Dryden, Peter Bear, William P. Fisher, G. W. Honey, twelve good and lawful men, who were duly sworn to try this cause; and after partial hearing defendant takes leave to amend his answer, and plaintiffs takes leave to reply, and further proceeding are postponed till to-morrow.

And afterwards at an adjourned day of the regular October term, 1882, of said court, and on the 12th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOHN TEAL *et al. against* JOHN S. BILBY.

This day again came the parties by their attorneys, and the jury sworn to try this cause as on yesterday; thereupon defendant files amended answer and plaintiffs file reply thereto, and further proceedings are had; and the hearing not being completed at the hour of adjournment further proceedings are postponed till to-morrow.

Said amended answer is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

JOSEPH TEAL, HENRY COLEMAN, JOHN Y. TODD, & JOHN S
17 STORRS, copartners, trading and doing business under the firm name of J. Teal & Co., Plaintiffs,

against

JOHN S. BILBY, Defendant.

Defendant for answer to plaintiffs' petition herein admits that said plaintiffs are citizens of the State of Oregon, and were and are partners doing business under the firm name of J. Teal & Co., and defendant denies each and every other allegation in said petition contained, save and excepting what is hereinafter expressly admitted.

Defendant for a second and further answer to plaintiffs' petition denies that they are entitled to the possession of the property described in their petition or were at the commencement of this action, or at any part of the same, for the reason that said property was on or about November 3d, 1880, delivered by plaintiffs to defendant to be fed and cared for by him; that he did feed and care for all of said cattle; that two hundred and sixty-eight of said cattle died without any fault or negligence on his part; and that he continued to feed and care for said cattle taken from him in this action until the same were taken from him in this action; that he became entitled to receive from plaintiffs for such feed and care of the cattle taken from him in this action the sum of thirty thousand dollars;

that said sum was at the commencement of this action due and unpaid, excepting the sum of one thousand dollars paid defendant September 1st, 1881, and that said sum of thirty thousand dollars ($30,000.00), less said one thousand dollars, is still due and unpaid.

18 Defendant further states that he advanced for freight charges on said cattle on behalf of plaintiffs to the Wabash, St. Louis & Pacific railroad for the freight of said cattle from Council Bluffs, Iowa, to Dawsonville, Missouri, on November 4th, 1880, the sum of seven hundred forty-two $\frac{50}{100}$ dollars; on November 5th, 1880, the sum of two hundred and forty dollars and fifty cents, and on November 7th, 1880, the sum of one hundred and sixty-five dollars, for which agreement with plaintiffs he was to receive interest thereon at the rate of ten per cent. per annum from the dates of said payments, respectively, and said cattle were to stand pledged to defendant as security for said payments and interest as aforesaid; that said sums so paid are and were, at the commencement of this action, wholly unpaid; that on the 7th day of November, 1880, defendant paid the Wabash, St. Louis & Pacific railroad, on behalf of plaintiffs, a feed bill on said cattle the sum of eighteen dollars; that said cattle were to stand pledged with the defendant as security for said payment as well as the other payments aforesaid; that said sums so paid is, and was at the commencemeht of this action, wholly unpaid.

Wherefore, defendant says he is now, and was at the commencement of this action, entitled to the possesion of said cattle, and demands return thereof and judgment for damages for the taking and detaining of said cattle in the sum of thirty thousand and four hundred dollars, with interest thereon at the rate of six per cent. per annum from the 7th day of December, 1881, together with his costs herein expended.

19 JOHNSON & ANTHONY,
WHITE & ALDERMAN,
L. DAWSON,
TICHENOR, WARNER & DEAN,
Attorneys for Defendant.

Said reply is in words and figures as follows, to wit:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, of the October Term, 1882.

JOSEPH TEAL and others, Copartners, doing business under the firm name of J. TEAL & Co., Plaintiffs,

vs.

JOHN S. BILBY, Defendant.

The plaintiffs, for their reply to defendant's amended answer, say that they deny each and every allegation contained in said amended answer.

The plaintiffs, for a further reply to second defense stated in said amended answer, say that the matters and things therein stated and pleaded are stated and pleaded by defendant in his answer to plain-

tiffs' petition in a certain case, wherein the above-named plaintiffs are plaintiffs and the above-named defendant is defendant, which is now pending in this court and undetermined, and that the matters and things set up in said several answers are the same and not other and different, and that the parties in the said case are the same and not different; wherefore plaintiffs pray judgment as demanded in and by their said petition.

20 EDWARDS & RAMSEY AND
WATERS & WYNE, *A. D.*

And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 13th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again came the parties by their attorneys and the jury sworn to try the cause above entitled. Thereupon further proceedinps are had; the hearing not being completed at the hour of adjournment, it is ordered that further proceedings be postponed till to-mórrow.

And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 14th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again came the parties by their attorneys and the jury sworn to try the issues herein. Thereupon further proceedings were had, and the hearing not having been completed at the hour of adjournment, it is ordered that further proceedings be postponed till to-morrow morning.

21 And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 15th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties by their attorneys and the jury sworn to try the issues. Thereupon further proceedings are had; and the proceedings not having been completed at the hour of adjournment, it is ordered that further proceedings be postponed till to-morrow morning.

And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 16th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day came the parties by their attorneys and the jury as on yesterday. Thereupon further proceedings are had, and this cause

not being submitted at the hour of adjournment, further hearing is postponed till Monday morning next.

And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 18th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

22 JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come again the parties by their attorneys and the jury sworn to try this cause. Thereupon further proceedings are had; and the hearing of evidence not being completed, it is ordered that further proceedings be postponed till to-morrow morning.

And afterwards at an adjourned day of the regular October term, 1882, of said court, and on the 19th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again came the parties by their attorneys and the jury sworn to try this cause. Thereupon further proceedings are had; and the hearing not being completed at the hour of adjournment, it is ordered that further proceedings be postponed till to-morrow morning.

And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 20th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

23 This day again come the parties by their attorneys and the jury sworn to try this cause. Thereupon further proceedings are had; and the hearing not being completed at the hour of adjournment, it is ordered that further proceedings be postponed until to-morrow morning.

And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 21st day of December, A. D. 1882, the following entry appears of records in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties by their attorneys and the jury sworn to try this cause. Thereupon further proceedings are had, and further hearing postponed until to-morrow morning.

And afterwards, at an adjourned day oft he regular October term, 1882, of said court, and on the 22nd day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties by their attorneys and the jury sworn to try this cause as on yesterday; and thereupon further proceed-

ings are had; and the hearing not being completed at the hour of adjournment, it is ordered that further proceedings be postponed until to-morrow morning.

24 And afterwards, on an adjourned day of the regular October term, 1882, of said court, and on the 23rd day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties by their attorneys, as on yesterday, as well as the jury sworn to try this cause; and thereupon further proceedings are had; and the hearing not being completed at the hour of adjournment, further proceedings are postponed till Tuesday next.

And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 26th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties by their attorneys, and the jury sworn to try this cause. Thereupon proceedings are had; and not being completed at the hour of adjournment, it is ordered that further proceedings be postponed till to-morrow morning.

And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 27th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

25 JOHN TEAL *et al. against* JOHN S. BILBY.

This day come again the parties by their attorneys, and the jury sworn to try this cause. Thereupon further proceedings are had; and not being completed at the hour of adjournment, further hearing is postponed till to-morrow morning.

And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 28th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day again come the parties by their attorneys, and the jury sworn to try this cause, as on yesterday. Thereupon testimony is heard; and not being completed at the hour of adjournment, it is ordered that further proceedings be postponed till to-morrow morning.

And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 29th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

26 This day come the parties by their attorneys, and the jury sworn to try this cause, as on yesterday; and thereupon further proceedings are had; and the hearing not having been completed at the hour of adjournment, further proceedings are postponed till to-morrow morning.

And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 30th day of December, A. D. 1882, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come the parties by their attorneys, and the jury sworn to try this cause. Thereupon the issues herein are submitted on the agreement of the counsel, and further hearing is postponed till Tuesday morning next, when the charge of the court will be delivered.

And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 2nd day of January, A. D. 1883, the following entry appears of record in said cause, to wit:

JOHN TEAL *et al. against* JOHN S. BILBY.

This day again come the parties by their attorneys, and the jury sworn to try this cause as on Saturday last. Thereupon, after hearing the charge of the court, the jury retire to consider what verdict they shall render in the premises; and after due consultation the
27 jury return into court the following verdict, to wit:

"We, the jury, find the issues for the defendant, and assess the value of the property taken at $66,598.35, and assess the defendant's interest therein at $23,835.12.

"W. W. RIGGS, *Foreman.*"

And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 3rd day of January, A. D. 1883, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

A verdict having been on yesterday returned into court by the jury in favor of the defendant and against the plaintiffs, it is now considered by the court that the defendant, John S. Bilby, recover against the plaintiffs, Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs, and against the sureties on the replevin board herein, P. A. Thompson, John Grigs, by Schuyler Rouk, David Rankin, Robert Hunter, James Rankin, Logan D. Young, the said sum of twenty-three thousand eight hundred and thirty-five dollars, the value of the defendant's interest in the property replevined, as found by the jury, or that said plaintiffs and sureties return to the possession of the defendant the property so replevined at his option.

It is further ordered that the defendant recover against said plain-

tiffs and sureties on the replevin board his costs herein expended, and have thereof execution as well as for his damage.

28 Thereupon come the plaintiffs, by their attorneys, and file motion for new trial.

Said motion for new trial is in words and figures as follows, to wit:

In the United States Circuit Court, Western Division of the Western District of Missouri.

JOSEPH TEAL *et al.*
vs.
JOHN S. BILBY. } No. 405.

The plaintiffs move the court to set aside the verdict herein and for a new trial, because—

(1.) The court erred in refusing to admit competent and proper evidence offered by the plaintiffs.

(2.) The court erred in refusing to exclude incompetent and irrelevant evidence offered by the defendant.

(3.) The verdict of the jury was against the evidence and the weight of the evidence.

(4.) The verdict is against the law of the case and is excessive.

(5.) The court erred in charging the jury as to the law of the case.

(6.) Matters were submitted to and passed upon by the jury which were not presented by the pleadings.

(7.) Under the pleadings and evidence the verdict should have been for the plaintiff.

L. H. WATERS AND
EDWARDS & RAMSEY, *A. P.*

29 And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 25th day of January, A. D. 1883, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come the parties by their attorneys, and the motion for a new trial coming on for a hearing, the same is argued by counsel, submitted to the court, and taken under advisement.

And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 5th day of February, A. D. 1883, the following entry appears of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come the parties by their attorneys, and the motion for a new trial having been called for hearing, the same is argued by counsel and submitted; and, on consideration of the premises, the court doth deny the same. Leave till first Monday in April to file bills of exception is given plaintiffs.

And afterwards, at an adjourned day of the regular October term, 1882, of said court, and on the 2d day of April, A. D. 1883, the following entry appears of record in said cause, to wit:

30 JOSEPH TEAL *et al. against* JOHN S. BILBY.

Come again said parties, and plaintiffs' counsel having prepared their bill of exceptions herein, and tendered the same ten days since to defendant's counsel for their examination, and defendant's counsel desiring further time for that purpose, it is ordered by the court, by consent of both parties, that the further consideration of said bill be, and the same is, postponed to the first day of the next term of this court.

And afterwards, at the regular May term, 1883, of said court, and on the 21st day of May, A. D. 1883, the following entry appears of record, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

Again come the parties to the above-entitled cause, by their respective counsel; and thereupon said plaintiff again presents their bill of exceptions herein, and pray the court to sign the same and make them a part of the record herein. Whereupon defendant's counsel ask the court for further time to examine said bill; and on the application of defendant's counsel, and by consent of parties, it is ordered by the court that the further consideration of said bill of exception in said causes be, and the same is hereby, continued until June 18th, 1883.

31 And afterwards, at the regular May term, 1883, of said court, and on the 30th day of June, A. D. 1883, the following entry appears of record, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come the parties, by their attorneys; whereupon defendant's objection to the bill of exception of plaintiffs are presented to the court, and the hearing thereof progressed; and not being completed at the hour of adjournment, the further hearing and consideration of the same is postponed till the first Monday in August next.

And afterwards, at an adjourned day of the regular May term, 1883, of said court, and on the 7th day of August, A. D. 1883, the following entry appears of record, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

It is ordered by the court that the hearing of the objections to plaintiffs' bill of exceptions be continued until the next term of this court.

And afterwards, at an adjourned day of the regular October term, 1883, of said court, and on the 26th day of February, A. D. 1884, the following entry appears of record, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

32 This day come the parties, by their attorneys; and the objections to the bill of exceptions being called for hearing, the argument thereof by counsel progressed, and not being concluded at the hour of adjournment, is postponed till to-morrow morning.

And afterwards, at an adjourned day of the regular October term, 1883, of said court, and on the 27th day of February, A. D. 1884, the following entry appears of record, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

Now again come the parties, by their attorneys; whereupon the argument of the objections to the bill of exceptions is proceeded with, and, not being concluded at the hour of adjournment, is postponed till to-morrow morning.

And afterwards, at an adjourned day of the regular October term, 1883, of said court, and on the 28th day of February, A. D. 1884, the following entry appears of record, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

Now again come the parties, by their respective attorneys; whereupon the argument of the objections to the bill of exceptions progressed, and, being concluded, said objections are submitted to the court.

33 And afterwards, at an adjourned day of the regular October term, 1883, of said court, and on the 7th day of April, A. D. 1884, the following entry appears of record, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

Upon motion of the plaintiffs, and by consent of counsel for defendant, it is ordered that the further hearing of objections to the bill of exceptions be continued till next term.

And afterwards, at the regular May term, 1884, of said court, and on the 16th day of June, A. D. 1884, the following entry appears of record, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come the parties, by their attorneys, and the bill of exceptions of plaintiffs being again presented to the court, the same are signed and sealed by the judge and ordered to be made a part of the record herein; and thereupon said bill of exceptions is filed. Said bill of exceptions is in words and figures as follows, to wit:

34 *Bill of Exceptions.*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at the October Term, A. D. 1882.

JOSEPH TEAL, HENRY COLEMAN, JOHN Y. TODD, and JOHN T. STORRS, copartners, doing business under the firm name of Joseph Teal & Co., Plaintiffs,
against
JOHN S. BILBY, Defendant.
} No. 405.

Be it remembered that this cause came on to be heard at this term, held on the — day of December, A. D. 1882, before the Honorable Arnold Krekel, judge of said court, and a jury.

Thereupon said court, at plaintiffs' request, consolidated this action with action No. 409, between same plaintiffs and defendant, for the purpose of trial, and said causes were tried before the same jury and on the same evidence, which was submitted for the purpose of the trial of both of said causes, and upon the same instructions given to the jury on both of said causes.

Thereupon plaintiffs, to maintain the issues on their part, introduced evidence tending to prove the following facts:

35 1. The plaintiffs, as copartners, were the owners of three thousand and seven head of good graded American cattle, in good condition and fine health, in the county of Wasco, State of Oregon, in the month of June, 1880; that these cattle were from two to eight years old, 325 being long 2 years old, but the greater portion being from four to five years old, all steers, except about sixty speyed cows, and that said plaintiffs, as such partners, were interested in the cattle as follows: Joseph Teal, one-third; Henry Coleman, one-third; and John Y. Todd and John T. Storrs, one-third.

That on the tenth and fourteenth days of June, 1880, said cattle were started by plaintiffs from Prineville and the Des Chuttes river, in Wasco county, Oregon, in two herds, of about fifteen hundred head each, one under the charge of Coleman and the other under Todd, to be driven across the plains, eastward, to a shipping point in Wyoming Territory, on the Union Pacific railway, and that they commenced arriving at Sheep Creek, twenty miles northwest of Rock Creek station, on that railway, about the third day of October, 1880, in good condition, but thin in flesh.

That said cattle had traveled a distance of about thirteen hundred and sixty miles, and had been driven on the trail an average of from eight to twelve miles per day, the herds at times mingling together, but kept separate on the drive for the purpose of

36 grass and water; that during the time they were on the journey the cattle had usually good grass such as the country afforded, and plenty of water on the route. except that at one time in the sand hills, near the foot of the Three Teton Mountains, they were from one morning until the next morning without water.

That in con-ection with these two herds there was a drag band, composed of lame cattle, and consisting of such cattle of the two herds as were disabled from traveling with them from time to time

on the route; and that this drag band of lame and disabled cattle amounted, at the time of the arrival of the cattle at Rock Creek station, to between two and three hundred head.

That said cattle remained at and in the vicinity of Sheep Creek Valley, with plenty of water and fair grass while there, awaiting cars for shipment at Rock Creek station, and that as soon as practicable after the arrival of the cattle they were put on board cars and shipped to Council Bluffs, in the State of Iowa, between the 14th day of October and the 10th day of November, A. D. 1880.

That the first shipment was made October 14th, 1880, of about three hundred and seventy-nine of these cattle from Rock Creek station to Council Bluffs, on cars over the Union Pacific railway, a distance of about seven hundred miles, and that these cattle arrived at Council Bluffs on the 17th day of October, 1880; that this
37 first shipment averaged with the balance of the herd in age, weight, health, and condition at the time of shipment, and were in good, healthy condition, but thin in flesh; and that they were stopped, unloaded from the cars, fed, watered, and rested from twelve to twenty-four hours at North Platt- city, on the Platt- river, on the route from Rock Creek station to Council Bluffs, as were all the other shipments of the herd made from same point to Council Bluffs. That there were from sixteen to nineteen cattle placed in each car of the various shipments, with two men in charge of the cattle for the owners on each train. The trains all stopped at North Platte city, and the cattle unloaded, watered, and fed, and rested from twelve to twenty-four hours, sent on to Council Bluffs, and there unloaded at the Union Stock Yards, and watered and fed immediately on arrival.

That after the first train-load of these cattle had been received at the stock yards at Council Bluffs, they were seen and examined by defendant Bilby at that place. That defendant was introduced to Joseph N. Teal, a son of one of the plaintiffs, by Mr. A. V. Bass, of the firm of Rosenbaum, Bass & Co., stock commission merchants at Council Bluffs, and agents for plaintiffs in handling their cattle, and was represented to plaintiffs as a large farmer and stock feeder from Missouri, who owned large bodies of land, and thousands of bushels of grain, and good pastures, and had experience and success
38 in feeding Western Oregon cattle, similar to those of Teal & Co., and was seeking either to buy cattle or to arrange about feeding them for the owners.

Upon examination of this first load of Teal & Co.'s cattle defendant was satisfied with them and so expressed himself; and thereupon negotiations were entered into between defendant and Joseph N. Teal for plaintiffs, for defendant to feed fifteen hundred of these cattle for plaintiffs, the first shipment to be a sample lot of what was to follow, and to save dispute Mr. A. V. Bass was made judge of the cattle.

At this time and before the final execution of the contract defendant knew and was informed by the plaintiffs of the manner in which the cattle had been handled on the trip from Oregon to Council Bluffs, and that they had passed through at and in the vicinity of

Rock Creek station, and the treatment they had received before shipment.

Afterwards, and on the 3d day of November, 1880, at Council Bluffs, plaintiffs and defendant entered into written contract of that date, which is attached to plaintiffs' petition, and which is in words and figures as follows, to wit:

"This contract, entered on this day, November 3d, 1880, by and between J. Teal & Co., of Portland, Multnomah county, Oregon, of the first part, and John S. Bilby, of Fairview, Nodaway county, Missouri, of the second part, is as follows:

39 J. Teal & Co. to weigh fifteen hundred (1,500) cattle at the Transfer Stock Yards, Council Bluffs, Iowa, after feeding, watering, and then shrinking twelve hours, to be delivered to John S. Bilby, at Dawsonville, Missouri, said cattle to be fed, watered, weighed, and handled by Rosenbaum, Bass & Co., Transfer Stock Yards, Council Bluffs, Iowa. The cattle to be delivered to John S. Bilby shall be the same that J. Teal & Co. drove this year from Wasco county, Oregon, to Rock Creek, Wyoming Territory, branded with "T" on the left side, similar in age, flesh, and quality to a train-load that arrived at Council Bluffs, Iowa, on Sunday, October the 17th, 1880. Mr. Bass, of the firm of Rossenbaum, Bass & Co., to be the judge of cattle arriving, whether or not they are an average lot with the train-load which arrived on Sunday, October 17th, 1880. If any train of cattle shall arrive prior to twelve o'clock m., they shall be taken off, feed, and water the same evening of the day of arrival at seven o'clock p. m. If they shall arrive after twelve o'clock m., they shall be shut off of feed and water at seven o'clock p. m. of the following day. Said John S. Bilby agrees to take these cattle and winter them well on hay, straw, and stock fields until grass comes; to be kept in enclosed pastures on good grass until the 15th of August, 1881, after which date on each and every day they shall be fed all the corn they will eat until

40 delivered to J. Teal & Co. John S. Bilby agrees to deliver the same cattle at Dawsonville, Missouri, after weighing them at the nearest scales to any feed lot, where each bunch of cattle may feed, after a twelve hours' shrink; such shrink to be within the same hours as when the cattle were first weighed and delivered. Cattle to be shrunk between seven in the evening and seven in the morning. In case J. Teal & Co. shall not take the entire bunch as fed in any one yard, they shall come and make selections of such cattle as they wish to cut out, from two to five days prior to the day of weighing. Said cattle to be weighed and delivered in lots of from one hundred and seventy-five (175) to two hundred and twenty-five (225), between the fifteenth day of October, 1881, and the first day of December, 1881, by giving ten days' notice either by telegraph, letter, or in person, at the option of J. Teal & Co., agreeing to pay five cents per pound for all increase of weights from time of weighing to Bilby to time of reweighing back to J. Teal & Co. They further agreeing to advance one thousand (1,000) dollars to John S. Bilby on the first day of September, 1881, to be applied to

payment of weights added to cattle on mast delivery, John S. Bilby to be responsible for all cattle lost, strayed, or stolen, and for any dying through the neglect or carelessness of the said John S. Bilby.

41 Any dying through causes which are unavoidable shall be shared thus: J. Teal & Co. to bear the loss of the steer and John S. Bilby the feed. If any steers die, John S. Bilby shall preserve the hide as evidence of death, and the ears, if there are any ear-marks. It is further agreed that if the said John S. Bilby shall pay the freight on said cattle from Council Bluffs to Dawsonville, Missouri, he shall be allowed ten per cent. interest on said sum, and the amount to be paid on the delivery of cattle to said J. Teal & Co. The said John S. Bilby agrees that if said cattle remain in his possession until December 1st, 1881, that he shall so feed and care for them that will increase four hundred and fifty (450) pounds each, on an average.

(Signed) JOSEPH TEAL & CO.
JOHN S. BILBY.

JOHN N. BALDWIN, *Witness.*

At the time of the final execution of this contract by the parties thereto all of the cattle received by defendant under it were at Council Bluffs; were seen and examined by defendant, and he expressed himself to plaintiffs and to Mr. A. V. Bass well satisfied and pleased with them.

At the time of the signing of the contract by the parties thereto, defendant, at plaintiffs' request, and in order to obtain their assent

42 and signatures thereto, executed to plaintiffs a bill of sale of the cattle to be delivered to defendant, which is in words and figures as follow, to wit:

Know all men by these presents, that I, John S. Bilby, of Nodaway county, and the State of Missouri, of the first part, for and in consideration of the sum of fourty-five thousand (45,000) dollars, lawful money of the United States, to be paid to J. Teal & Co., of Portland, in the county of Moultnomah, State of Oregon, second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, their executors, administrators, and assigns, the following-described property now in his possession, to wit: Fifteen hundred (1,500) head of steers, from two to five years old, branded with "T" on the left side, to have and to hold the same unto the said party of the second part, their executors, administrators, and assigns, forever; and I do for my heirs, executors, and administrators, covenant and agree to and with the said party of the second part, their executors, administrators, and assigns, to warrant and defend the sale of said property, goods, and chattels, hereby made unto the said party of the second part, their executors, administrators, and assigns, against all and every person and persons whomsoever.

In witness thereof I have hereunto set my hand, this third day of November, A. D. 1880.

JOHN S. BILBY.

43 STATE OF IOWA, } ss:
Pottawattomi- County, }

On this third day of November, 1880, before me, a notary public, within and for said county, personally came John S. Bilby, personally known to me to be the identical person, whose name is affixed to the above instrument as grantor, and acknowledged the execution of the same to be his voluntary act and deed for the purpose therein expressed. Witness my hand and notarial seal.

[SEAL.] JOHN N. BALDWIN.
Notary Public.

Plaintiffs' attorneys, upon reading bill of sale, stated that they introduced it as a part of this transaction, and to show that defendant was not the owner of the cattle.

Of the cattle mentioned in the contract there were received at the Union Stock Yards at Council Bluffs, from the Rock Creek station, over the Union Pacific railroad, November 1st, 1880, sixteen cars containing 340 head, and fifteen cars containing 309 head; November 2nd, 1880, eight cars containing 170 head, and on November third, twenty cars containing 441 head, and nineteen cars containing 414 head. Of the cattle in these shipments five died in transportation from Rock Creek to Council Bluffs, and their carcasses were brought to Council Bluffs in the same cars they were shipped.

44 The evidence tended to show that the defendant was present at Council Bluffs, and about the stock yards in the regard to the contract for the feeding of these cattle at the time of the receipt of these cattle at the stock yards in Council Bluffs. Defendant was present at the time of the receipt of these cattle at the stock yards at Council Bluffs; they were placed in different pens there, and were well fed and watered in the stock yards while remaining there, the same as all cattle are that come and stay there any length of time, and were at the times of such arrival, in age and quality and condition, and having the same brand as the sample train load mentioned in the contract as arriving October 17th, 1880. About thirteen hundred of these cattle were seen and examined by Mr. A. V. Bass, of the firm of Rosenbaum, Bass & Co., of the transfer stock yards at Council Bluffs, mentioned in the contract, as they arrived there, and were judged by him to be an average lot with the train load of October 17th, 1880, as to age and grade, but were thin-er in flesh. Of these cattle there were weighed at Council Bluffs by said Bass to defendant, under the contract in evidence, one thousand head, November 4th, 1880; three hundred November 5th, 1880, and two hundred Nov. 6th, 1880, making in all fifteen hundred head of cattle, and averaging nine hundred and fifty pounds per head, delivered to defendant Bilby under the contract of November 3rd, 1880. Mr. Bilby was present at the weighing of the

45 cattle, and assisted in weighing them, and expressed himself satisfied with them. The cattle thus weighed to defendant Bilby, and received by him, were all branded "T" on the left side, were a part of the Oregon trail of J. Teal & Co.; were selected from

the shipments by plaintiffs, who endeavored to give defendant the best of the cattle, in order that the best cattle could be put out to feed, and all were taken off feed and water at Council Bluffs, and shrunk before weighing, in pursuance of the terms of the contract between plaintiffs and defendant.

After these fifteen hundred head of the Oregon trail cattle of plaintiffs had been weighed they were, on the 4th, 5th, and 6th days of November, 1880, placed on the cars at Council Bluffs and shipped on the Wabash, St. Louis and Pacific railway to defendant at Dawsonville, Missouri, a distance of eighty miles. The freight on these cattle from Council Bluffs to Dawsonville, amounting to $1,169.50, was, at the instance and request of plaintiffs, paid by defendant to the railroad company. That the "drag-band" of the Teal & Co.. herd, consisting of two hundred and seventy-seven head, arrived at Council Bluffs from Rock Creek station November 12th, after the cattle delivered to Bilby had been shipped to Dawsonville, and none of them were included in the Bilby cattle, or delivered to him, but all were otherwise disposed of by plaintiffs.

46 Plaintiffs further introduced evidence tending to prove that these fifteen hundred cattle arrived at Dawsonville, Missouri, on cars as follows: Forty-nine cars, November 4th, 1880, at 7 30 p. m., 9 p. m., and 10 p. m.; fifteen cars, November 5th, 1880, at 8 p. m., and ten cars, November 6th, at 9 p. m., without having either food or water on the trip from Council Bluffs to Dawsonville.

That the cattle were unloaded after arrival and crowded into insufficient stock pens and lanes, and remained without food or water until taken away.

That the cattle were divided into two herds by defendant, and about eleven hundred of them were driven away the next days after arrival, without food or water, to the open prairie, a distance of one and a half miles west of Dawsonville, and placed on an unenclosed piece of ground which had been grazed down by neighboring cattle, and were permitted to remain there without food or water for two days and nights, when they were driven South, kept on an open prairie without food or water that night, and then driven to a large pasture and stock field on the Nodaway river.

That the remaining four hundred were unloaded at Dawsonville and kept in the stock pens and lane without food or water thirty-six hours, while they were branded by John Wishard, for defendant, and then driven West and taken and placed in grass pasture.

47 That each of said herds were kept by defendant and his employés upon insufficient food, and were not well wintered upon hay, straw, and stock fields by defendant. That said cattle suffered for want of food and water during the months of November and December, 1880, and January, February, and March, 1881. That at no time did they have sufficient hay or straw for food for more than a few days at a time, and that for the greater portion of said months they had neither hay nor straw, but were kept upon cornstalks and stubble fields and dry dead grass pastures after such fields and pastures had been eaten bare of food for the cattle, and

that they were during said months, for a week to ten days at a time, in such stock fields and pastures in a starving condition, thin in flesh, and many dying for want of food and water. That at no time were said cattle sheltered or protected from the stormy or severe cold weather of the winter of 1880 and 1881, and that some died from exposure to snow storms. That in the various fields in which the cattle were held during the winter the stocks were eaten down until the stubs were not more than a foot or two feet high, and bare of blades and husks; that the grass, weeds, and vegetable growth of every description were cleaned off by the cattle, until the fields were perfectly bare; that the cattle on different occasions broke from their enclosures and over fences and into adjoining cornfields for food, and that some of them died from overeating in
48 such neighboring fields. That some of said cattle were drowned in Nodaway river, in defendant's fields, by moving in the mud and water of the river in attempting to get water to drink, and that others died after moving in the mud at the springs in the enclosure when they went for water.

That in the spring of 1881, and in the month of April, before the wild grass had grown upon the prairie sufficient for food for the cattle, they were placed on unenclosed prairie range and permitted to remain there without sufficient food or water until about the month of June, 1881, when said prairie was enclosed by defendant, and that in the summer of 1881 said cattle were held in the enclosures which did not furnish sufficient grazing or water for the cattle.

That said cattle were not fed all the corn they could eat during the fall and winter of 1881. That defendant placed said cattle upon corn about the 15th day of August, 1881, and fed them partly green corn and stocks and partly musty old corn, until corn matured that year. That said cattle were not full fed during the months of August, September, October, and November, 1881, by defendant on corn, and that on different occasions a portion of said cattle in the fall of 1881 broke from their enclosures into the adjoiniug cornfields in search of food, and some of them were killed by overeating in such adjoining fields.

49 That from want of sufficient hay, straw, and stock pasture, and from want of water in the winter of 1880 and 1881, as herein stated, and from want of proper care and attention to said cattle by defendant, during the time they were in his possession, one and fifty head of said cattle died.

The plaintiff Coleman resided with defendant from on or about the 5th of December, 1880, up to the time of that last shipment, and continued to live with him and to look after the cattle in defendant's care until the March following. After that time he remained on defendant's premises and boarded with one of his tenants; he was, until on or about the middle of September, at all times with plaintiffs' cattle.

While the plaintiff Coleman resided with the defendant he was furnished a horse by the latter which he could and did use to ride over defendant's premises to look after the cattle in charge of the defendant and his employees.

The plaintiff Coleman did, from time to time, assist the defendant and his agents and employees in moving the cattle about defendant's premises during the winter, and took immediate charge of four hundred of them under defendant, and with these cattle so under his charge there were at least two hundred of defendant's cattle, including cows and calves; and while they were so under his charge the said Bilby lost one cow, while giving birth to a calf, and no others, and several of plaintiffs' died. The said Coleman had such charge of them for at least one month, beginning December 10th, 1880.

400 of the cattle delivered into the custody of Wishard were kept on another part of defendant's premises by Wishard for defendant. These cattle the plaintiff Coleman did not visit for the purpose of ascertaining the care and treatment they were receiving at the hands of Wishard for Bilby until on or about the 11th or 12th of January, 1881. He did not visit them again and examine as to their care and treatment by Wishard until nearly a month later.

The plaintiff Coleman was a well-to-do and experienced cattle man, who had been engaged in the business of handling and selling cattle for a great many years previous to the time plaintiffs entered into the contract with defendant.

3.

That on the 1st day of December, 1881, plaintiffs, in accordance with the terms of said written contract, paid to defendant the sum of one thousand dollars in cash, for which defendant gave a receipt, endorsed by defendant, on said contract, which is in words and figures as follows, to wit:

$1,000. NODAWAY COUNTY, MISSOURI, *September 1st*, 1881.

Received from Joseph Teal & Co. the sum of one thousand dollars on the within contract.

JOHN S. BILBY.

Defendant also executed to plaintiffs, at the time of said payment, another receipt, as follows:

NODAWAY COUNTY, MISSOURI, *Sept.* 1, 1881.

Received of Joseph Teal & Co. the sum of one thousand dollars, on contract of December 3rd, 1880, same being endorsed on contract at this date.

J. BILBY.

That afterwards, and before the first day of December, A. D. 1881, plaintiffs duly notified defendant that they would be ready to receive and demand the delivery of the fifteen hundred head of cattle according to the terms of the contract of date November 3rd, 1880, at Dawsonville, Nodaway county, on the first day of December, 1881.

That in pursuance of said notice (342) three hundred and forty-two cattle then in the possession of said John Wishard, the subcon-

tractor of defendant, were weighed on the first day of December, 1881, and that on the 1st and 2nd days of December, 1881, (898) eight hundred and ninty-eight of said cattle in possession of defendant were weighed, and the total weight of said (1,240) twelve hundred and forty head of cattle was 1,595,165 lbs., an average of 1,276 lbs per head; which is an average gain of 356½ lbs. p'r head; said cattle weighing at the time of their delivery to defendant an average of 950 lbs. p'r head.

That after said cattle were weighed the same were driven to Dawsonville on the second and third days of December, 1881. The plaintiffs were present, ready to receive the cattle under the terms of said contract, and demand at Dawsonville, December 1st, 1881. That after the 1,240 cattle had arrived at Dawsonville plaintiffs made another demand of defendant for the fifteen hundred head of cattle, according to the contract, to be delivered at Dawsonville, and notified defendant that they were ready to settle according to
52 the contract, and demanded the production of the hides of such as had died, according to the terms of the contract, and that defendant refused to deliver any of the cattle to plaintiffs until he was paid for the number of pounds put on them by the care and feed of defendant, and claimed that he had preserved the hides of such as had died, and had notified plaintiffs thereof.

That said cattle remained at Dawsonville in defendant's possession until the 7th day of December, 1881, and while in his possession were kept on insufficient food and water. That on the 7th day of December the United States marshal, under the writ of replevin, took from the possession of defendant twelve hundred and twenty-nine of said cattle and delivered them into the possession of plaintiffs at Dawsonville, Missouri, from which place they were immediately place on board cars and sent to Chicago, in the State of Illinois.

That at the time said cattle were delivered at Dawsonville, by defendant, on said 2nd and 3rd days of December, 1881, said cattle were thin in flesh, were not good fat cattle for beef, and were not worth as much as cattle similar in quality and condition, but weighing fourteen hundred pounds, by one dollar and fifty cents per hundred pounds.

Plaintiffs then introduced evidence tending to prove that said cattle were injured by reason of want of proper care and sufficient food and water from the time they were brought to Dawsonville, on the 2nd and 3rd days of December, 1881, after being weighed, until they were taken by the United States marshal under the writ of replevin on the 7th day of December, fifty cents per hundred pounds on each head.

53 Plaintiffs then introduced evidence tending to prove that after said cattle had been taken by said marshal, under said writ, said 1,229 head of cattle were well cared for, fed, and watered by plaintiffs until they were transferred by railroad on cars to Chicago, Ill., about the 10th day of December, 1881.

Plaintiffs then introduced evidence tending to prove that there was no market for the sale of such a large lot of cattle as those taken by said marshal, under said writ, at Dawsonville, Missouri, at the time

said cattle remained there in the month of December, 1881, so that said cattle could be sold for their full value, or that said cattle could be sold or disposed of at Dawsonville at that time, except by dividing the herd and selecting the different grades for shipment as beef cattle, and for feeders of cattle therefrom, and selling or disposing of the same in such lots and grades.

4.

Plaintiffs then offered to prove by deposition of Samuel Wood, duly taken and certified in said action, and by other competent and credible witnesses, that said cattle were received at Chicago on and about the 12th day of December, 1881, and were sold on the market at the full market value of said cattle, at the time at from 3½ to 4 cents per pound, and that the total amount received by plaintiffs at Chicago for said cattle was $54,123.29, which was their full value at that time and place, and that Chicago was the nearest general market for said cattle to the town of Dawsonville.

54 To which deposition and all testimony offered by plaintiffs to prove said facts, or either of them, defendant objected; and said objections were by the court sustained, and the court refused to allow plaintiffs to read said deposition, or produce any such testimony before the jury, and excluded the same from the jury; to which action of the court in refusing to allow plaintiffs to read said deposition or produce said testimony, before the jury, plaintiffs at the time duly excepted and still except.

Plaintiffs then further offered evidence tending to prove, by the deposition of said Samuel Wood, and by the depositions of other competent witnesses at Chicago, duly taken in said action, that said cattle were not in a good condition for beef cattle, but were too thin in flesh; that cattle of like quality, but weighing fourteen hundred pounds, were worth more in the markets of Chicago during the month of December, 1881, than the cattle of plaintiffs in the condition they were as to weight at that time, of two dollars and fifty cents per hundred pounds.

Plaintiffs then introduced evidence tending to prove that on the first and second days of December, 1881, at Dawsonville, Missouri, said fifteen hundred head of cattle, if they had been increased in weight four hundred and fifty pounds each, so as to weigh on an average fourteen hundred pounds, would have been worth five and one-fourth cents per pound, and that the twelve hundred and twenty-nine head of cattle taken by the marshal were not worth as much at that time and place by one dollar and fifty cents per hundred pounds as if the same cattle had weighed fourteen hundred pounds per head, but that there was no market for such cattle at Daw-

55 sonville at that time, so that said cattle could be sold or otherwise disposed of, excepting by dividing the same into lots and grades for shipment as beef cattle and as feeders.

Defendant, to maintain the issues on his behalf, offered evidence tending to prove the following facts:

1. That the Oregon trail cattle of plaintiffs arrived near Rock

Creek station early in the month of October, 1880, very poor in flesh, and that they were held on the open range in the vicinity of Seven Miles Springs, northwest of Rock Creek station and the Soda Lakes, about 12 miles from Rock Creek; that there was very little grass in that vicinity, and water was very scarce; that there was no water there except the springs, the water of which is alkali; that the water on Rock Creek was standing in holes, no running water in it, and that most of the holes were frozen solid, a few not; that the Teal cattle arrived late in the season, and after other herds had been on the ground; that the snow came at and in the vicinity of Rock Creek very early that fall, the first snow being about the 20th day of September, and that during the time the cattle remained there the weather was very severe, but not very cold until the middle of October; that for ten days previous to the latter part of October was very snowy and stormy, and that the snow on the ground around Rock Creek, where the cattle were herded, was about four inches deep, and that the thermometer at times ranged from 25 to 30 degrees below zero; that the cattle, during the time they were
56 held in the vicinity of Rock Creek, could get no water except the alkali water; that the range was bare of grass, the snow covered the ground, cattle could get nothing to eat, and that they were exposed to the snow and storms and cold weather while in that vicinity; that the herders of plaintiffs were two white men and six or seven others, Indians, who did not understand herding cattle; that the first shipment from Rock Creek was made Oct. 14th, 1880, of twenty cars eastward to Council Bluffs, and that these cattle were stronger and in better health and flesh than those shipped afterwards.

That of the cattle that remained after the first shipment a portion had been held in the storms, and had been driven to Rock Creek once for shipment and back to Seven Miles Springs for want of cars. That these cattle were herded at Rock Creek before shipment, kept in pens one night, turned out, and held on the divide, where there was no feed, and penned again at night, then drove back to Seven Miles Springs, and afterwards again brought to Rock Creek station and loaded on cars about the last of October, 1880.

That some twelve to fifteen of the cattle died on the range between Rock Creek and Soda Lakes, and that the cattle at the time of the shipment were very poor and weak, so that a number of them were down and had to be prodded up to get them up, and that one died in loading on the cars. That the water on the range was damaging to the cattle, and would have the effect of scouring them, make them weak and sick, caused the hair to come off after they were delivered to Bilby, and that the cattle would have a scabby appearance. That the cattle were not carefully and judi-
57 ciously handled while at and in the vicinity of Rock Creek. That they were herded by Indians, who handled them very roughly and jammed them around and close herded them, and that the cattle were damaged and injured while there by the treatment they had received, want of food and good water, exposure to storms and extreme cold weather, and from drinking the water

strongly impregnated with alkali of Seven Miles Springs and Soda Lake.

3. Defendant further, to maintain the issues on his part, introduced evidence tending to prove that the Oregon trail cattle of plaintiffs commenced arriving on cars from Rock Creek station on the 17th day of October, 1880, and that there was one or two shipments between that date and November 1st, before any of the cattle which defendant received under the contract of November 3rd, 1880, had arrived at Council Bluffs. That of the shipment of cattle from which the fifteen hundred head delivered to defendant under said contract were taken there were a great many of them down in the cars on their arrival at Council Bluffs, and a large number of them jammed and bruised, and others dead in the cars. That the cattle down in the cars on arrival at Council Bluffs were so weak and exhausted from want of sufficient food and water that they had to be pulled out of the cars, and that cattle on arrival at Council Bluffs were in a poor condition as to flesh, and looked as if they had suffered from want of food and proper handling. That of the cattle that were down in the cars, and others of these shipments, at least fifty died either in the cars or after they had been placed in the pens
58 at the stock yards at Council Bluffs, and their carcasses were sold by plaintiffs; and that others of these cattle were down in the yards and could not get up on account of weakness from want of food and water.

That immediately on arrival the Teal cattle were given all the hay they could eat and all the water they could drink, as other cattle coming in the yards, and that said cattle had all the hay they could eat and all the water they could drink while in the stock yards; that the 2,600 or 2,700 head of Teal & Co.'s cattle at Council Bluffs were fed 90,000 lbs. of hay from Nov. 1st to Nov. 5th, 1880; that a portion of the first shipment of these cattle received by Bilby, amounting to about five hundred, were so fed and watered for three or four days, and that the cattle weighed more by reason thereof by between 25 & 50 lbs. than they otherwise would have weighed if they had been taken off, fed, and watered the same day of arrival, or the day thereafter, as provided by the contract; that the cattle were not shrunk before weighing, as provided by the contract, and this was unknown to the defendant and to said Bass. That defendant did not examine the cattle on their arrival at Council Bluffs until after they were weighed, and that he had no personal knowledge of the manner they had been treated after arrival at Rock Creek station, and before arrival at Council Bluffs, and was not informed thereof by plaintiffs at any time.

That said A. V. Bass, mentioned in the contract as the judge of the cattle as to age, flesh, and quality, did not look after the matter of the selection of weight of the cattle, except as to the thir-
59 teen hundred head which he delivered to defendant, although he knew of the weighing of the other two hundred head for the defendant.

That said Bass did not know anything about how the cattle (delivered to defendant under the contract) had been treated between

October 17th and November 1st, 1880, at and in the vicinity of Rock Creek station.

Defendant introduced evidence tending to prove that the time A. V. Bass undertook to act as judge between plaintiffs and defendant as to the kind of cattle that plaintiffs should deliver to defendant under said contract, the firm of which the said A. V. Bass was a member was receiving a commission of fifty cents per head on each and every head of cattle delivered by the plaintiffs to defendant under said contract, which fact was unknown to defendant at the time of his receiving said cattle.

That 1,300 head of said cattle were taken to Dawsonville by def't on the cars about November 4th, 1880, and were in no better condition when shipped than when they arrived at Council Bluffs, except that they had been fully fed and watered; that in shipping the cattle on board the cars at Council Bluffs for Dawsonville some of the cattle were so weak, from want of proper feed and care, and others were not in a fit condition to ship at all, owing to their weak and debilitated condition, and that on arrival of the cars at Dawsonville there was one of said cattle dead in the cars.

The defendant introduced evidence tending to show that the agent of the plaintiffs accompanied the cattle from Council Bluffs to Dawsonville for the purpose of delivering the same at Dawsonville to the defendant, and also for the purpose of examining and
60 ascertaining the fields of the defendant and his facilities for carrying out the contract for the keeping of the cattle.

Defendant introduced evidence tending to show that he was the owner of a large body of land, consisting of about fourteen thousand (14,000) acres, and had abundance of pasturage, hay, straw, and stalk fields and corn for carrying out the contract, and that the said land was well supplied with good living water.

Defendant introduced evidence tending to show that the agent of plaintiffs who accompanied the first thirteen hundred cattle was present at Dawsonville, and superintended their unloading from the cars and delivery at that place to the defendant; and that the defendant then engaged a sufficient number of men to take charge of the cattle, and that they were unloaded as rapidly as possible. That upon their arrival at Dawsonville they were in a very weak condition. That they were properly handled while there, and with care driven to defendant's farm, a distance of about eight miles, having on the drive an abundance of food and water.

Defendant introduced evidence tending to prove that from the time the fifteen hundred cattle were received by the defendant at Dawsonville up to the time of the delivery at Dawsonville in December, 1881, they had been in charge of careful, prudent, and experienced feeders, being kept all the time in pastures and feed-pens, and fed in accordance with the terms of the written contract and as the same was modified in December, 1880.

61 Defendant further introduced evidence tending to prove that a part of the cattle delivered to the defendant by plaintiffs were not a part of the herd which the sample lot belonged to, and that this fact was unknown to the defendant or his agent when

said cattle were received and examined by the defendant Bilby at Dawsonville.

4. Defendant further, to maintain the issues on his part, introduced evidence tending to prove that on the arrival of the fifteen hundred head of cattle received by him under the contract of November 3rd, 1880, said cattle were in a feverish condition, were unloaded as rapidly as possible from the cars, divided into herds, and driven carefully and slowly, and as soon thereafter as practical from Dawsonville to pastures near Fairview, about eight miles distant, and that 1,100 head of them were turned on good grass pastures for a few days, and that such pasturing was best for the cattle, after which they were placed in stock fields, where they had access to straw stacks, hay, and good water.

That the balance of the cattle were driven by Wishard slowly about ten miles southwest of Dawsonville and placed in a pasture field of wild and tame grass, with stacked hay, straw, and cornstalks, where they remained about four weeks, with plenty of feed and good water, and that thereafter they were placed upon stock pasture with hay, straw, and cornstalks. That in driving the cattle from Dawsonville to the various pasture fields from five to ten of them died from weakness and exhaustion, and within thirty days thereafter from twenty-five to thirty died in the fields from same causes, and that the cattle were in very poor condition, weak
62 and thin, and did not improve upon the feed they were receiving.

Defendant introduced evidence tending to prove that about four hundred of the defendant's cattle ran with the cattle received from plaintiffs, fed the same and received the same treatment, and that out of these two hundred only two died, and that the defendant sold a large number of his cattle in Chicago markets during winter of 1880 & 1881 as fatted beef cattle which had received precisely the same care and feed as plaintiff's; that plaintiff Coleman took charge himself of one of such shipments by defendant to Chicago.

That defendant introduced evidence tending to prove that the three hundred head of cattle which arrived at Council Bluffs October 17th, and referred to in the written contract as the sample lot, were a picked lot of younger and stronger cattle, and in better flesh than those which followed. The cattle afterwards received by Bilby were a mixed lot of cattle whose ages ranged from two to eleven years, and that the cattle received by Bilby were remnants or tailings of the herd.

That Teal & Co. had become indebted to Rosenbaum, Bass and Company, their commission merchants, in a considerable sum, and that they had previously sold all the cattle belonging to the herd driven by them from Oregon to Rock Creek, and afterwards shipped to Council Bluffs, which were available for sale. And that there were cattle delivered to the defendant at Dawsonville which did not belong to the herd from which the sample lot of October 17th, 1880, were taken, but that the plaintiffs had procured during the cold
63 season preceding November 1st certain other cattle at Cheyenne, Wyoming Territory, which they delivered to the de-

fendant as part of the herd from which the sample lot had been selected, which fact was unknown to Bass and defendant.

The defendant introduced evidence tending to show that the appearance of the cattle when they were delivered to him by the plaintiffs would not disclose the treatment they had received previously, and that it required time to develop the evil effects of such treatment; that although the cattle night appear to be very thin and weak, yet it would not be apparent that they were diseased; on the contrary, experienced cattle men might well suppose that they would, upon the treatment provided for in the contract, soon recover their flesh and strength.

He also introduced testimony tending to show, not only the death of two hundred and sixty-eight of the cattle as aforesaid, but that as to many of the others that survived the winter of 1880 and 1881, although they were fed upon corn, all they could eat during the winter, they always presented a scabby appearance and did not thrive from their food, and that when the spring came they were placed upon grass. They did not shed their hair, but were, in the language of a number of the witnesses, "stuck cattle."

And that upon an examination of the cattle, it was considered by said Coleman and defendant that the cattle could not be wintered on hay, straw, and stock fields, and it was a few days thereafter finally agreed upon between Coleman and defendant that defendant should let the cattle into corn, and whatever time that they went into corn that winter should be deducted off of the corn feed next year at the end of the next grain feeding, and that de-
64 fendant should also be released from the stipulation of the written contract requiring him to increase the average weight of the cattle four hundred and fifty pounds per head.

Defendant introduced evidence tending to show that — the time the defendant received the cattle from the plaintiffs to September 1st, 1881, all the plaintiffs except Coleman were residing in the State of Oregon; that the plaintiff Coleman accompanied these cattle from Oregon to Council Bluffs; that on the 4th of December the plaintiff Coleman went to defendant's house, and remained three for a period of fifty-nine days, seeing these cattle every day; was familiar with the manner in which they were being fed, and assisted in taking care of the same, having the use of the defendant's horses for the purpose of riding over the fields and pastures to inspect the cattle, and after the expiration of the fifty-nine days to the first of September, 1881, he remained on the defendant's farm, boarding with one of the defendant's tenants where these cattle were being kept, and was familiar with the manner in which they were being fed and their treatment, and that during all that time, from the fourth day of December, 1880, to the 1st day of September, 1881, he made no complaint as to the treatment these cattle received from the defendant.

That on the 1st day of September, 1881, the plaintiffs paid the defendant one thousand (1,000) dollars for feeding said cattle, and that all of the two hundred and sixty-eight cattle excepting two had died prior to the said first of September, and that it was through

no fault or negligence of defendant that any of plaintiffs' cattle died while in his care, but that they died through unavoidable causes.

65 Defendant further introduced evidence tending to prove that plaintiff Coleman had made statements thereafter to various witnesses on different occasions which tended to prove that the contract had been changed as testified to by defendant.

Defendant then introduced evidence tending to prove that immediately after the said change and modifications of the written contract defendant placed said cattle in stock fields and cornfields which contained good corn in the ear, and that they were fed, except for a few days, from that time forth, through and during the winter of 1880 and 1881, all the corn and feed that they would eat, but that many of said cattle were in such weak and exhausted condition from previous bad treatment before Bilby had received the cattle that a large number of them, amounting to two hundred and sixty-eight, died while in possession of Bilby. That said cattle were fed about seventy-five days during said winter of 1880 and 1881 on corn and stock fields, were placed in good grass pastures in the spring of 1881; after grass came in enclosed grass pastures on good grass, with plenty of water, until August the 15th, 1881, except a part of them for a short time were placed on prairie, where there was good grass, and fenced all around, except the road openings, and these were guarded, when the cattle were fed with all the corn they could eat until November 1st, 1881. That on the 28th day of October, 1881, defendant served plaintiffs with the following notice:

To JOSEPH TEAL.

66 SIRS: You will take notice that on Monday, the 31st day of October, 1881, I shall begin to weigh and complete the weighing, as soon as practicable, of the steers placed in my keeping under contract with you in the fall of 1880. Under and by virtue of said contract as finally made said steers were fed corn for two and one-half months in the fall of 1880, whereby your option under the same, as to the time of receiving said steers, expired on October 1st, 1881.

I hold myself in readiness to deliver said steers after weighing to you at Dawsonville, Mo., in such numbers as you may desire, pursuant to the terms of said contract, after payment being made to me of the interest the weights may prove I have in the same, together witn the advanced freights thereon.

Said weights will be made at Fairview, Nodaway county, Mo., and on my farm, on section 5, township 65, of range 38, in Atchison county, Mo.

JOHN S. BILBY.

Fairview, Nodaway Co., Mo., October 25th, 1881.

This was served at Council Bluffs, Ia., on both Teal and Coleman on the 28th of October, '81, by copy, by Jno. A. Wishard.

That in pursuance of said notice, at Fairview, and on said 1st day of November, 1881, defendant weighed said cattle, amounting

to 1,243 head, and that said 1,243 cattle weighed one million five hundred and fifty-three thousand three hundred and five pounds. The plaintiffs did not appear at said place to receive said cattle or comply with the terms of said notice.

67 That thereupon said cattle were turned into stock pasture fields, and full fed until December 1st, 1881, on corn, and that the value of said corn so fed to them during that time was $9,420.

That on the 15th day of November defendant received written notice from plaintiffs, demanding the cattle under written contract of November 3rd, 1880, to be weighed and delivered at Dawsonville December 1st, 1881.

Said notice was in words and figures as follows:

"To JOHN S. BILBY:

You are hereby notified that we will be ready to receive from you on the 1st day of December, 1881, the cattle, consisting of fifteen hundred head of steers, belonging to us, and placed in your keeping under a written contract, dated November 3rd, 1880, and we hereby notify you that on said 1st day of December, 1881, we will demand said fifteen hundred head of steers at your hands.

November 15th, 1881.

TEAL & CO."

That in pursuance of said notice defendant commenced to weigh 1,240 of said cattle on the 1st and 2nd days of December, 1881, and that said 1,240 cattle weighed at that time and place one million five hundred and eighty-four thousand one hundred and sixty-four pounds.

Defendant introduced testimony further tending to prove that plaintiffs disturbed said cattle by building a fire near the pens where the cattle were held on the nights of November 30 and December 1st, 1881, just prior to the days when said cattle were to be weighed, and that by reason of such disturbance the weight of said cattle *at* the same were weighed on said first and second days of December was reduced 25 to 50 lbs. per head.

68 Defendant further introduced testimony tending to prove that said cattle were shrunk before weighing, according to the terms of said written contract, and that after the same were weighed he offered to deliver them over to plaintiffs on payment in cash by plaintiffs of five cents per pound for all extra weight over and above nine hundred and fifty pounds per head, according to said weights of November 1st, 1881, and on the payment for the care and feed for the same from that time to December 1st, 1881, and for the freights defendant had paid on said cattle from Council Bluffs, which payment plaintiffs refused to make, and demanded said cattle to the number of fifteen hundred head.

Defendant introduced evidence tending to prove that of the two hundred and sixty-eight cattle that died, defendant took off and preserved the hides of all of them, except seventeen. That defendant offered to take off the hides of these, they being frozen. Plaintiff

Coleman expressly stipulated that defendant need not take off their hides; that he knew they were dead, and that was all he wanted; and that in March, 1881, plaintiff Coleman agreed to count and receive the hides defendant had taken off of the cattle, he then stating he wished to market them; and defendant got them together for that purpose, but plaintiff afterwards refused and neglected so to do. That defendant had two hundred and fifty-one (251) hides on his farm ready for counting, inspection, and receiving by plaintiffs. That again, in April, 1881, defendant tendered these hides to plaintiff Coleman, and requested him to count, inspect, and receive them, which he refused to do. That during the
69 summer of 1881 these hides rotted and became spoiled without any fault on the part of the plaintiff.

Defendant further introduced evidence tending to show that the market value of said cattle at Dawsonville on the first days of December, 1881, was three and a half cents per pound to four cents per pound, and that the difference in value between the cattle at Dawsonville, Mo., on said first day of December, 1881, which he had weighed and ready for delivery, and the same cattle weighing 1,400 lbs., would not exceed fifty cents per hundred pounds.

The defendant introduced evidence tending to show that there was a market for cattle at Dawsonville, Missouri; that the surrounding country for many miles was very productive and well inhabited, and a large portion of the population was devoting their time to the raising of cattle. That there were a number of cattle buyers at that place, and that the value of beef cattle at that place was the Chicago market price for the same kind of cattle, less freight and the ordinary shrinkage of cattle between those places, occasioned by their shipment. That in the summer of 1881 there was a large demand there for such cattle as those replevined by the plaintiffs from the defendant, for the reason that with the exception of a few of the cattle which were described in the testimony of the witnesses as "stuck cattle" the others were in a fine condition to be taken and fed for fatted beef cattle. And that the cattle dealers in and around Dawsonville in that season of the year were buying cattle in Chicago and other markets and shipping them to Dawsonville for the purpose of selling them to parties in the sur-
70 rounding country as feeders; that is to say, to be fed until they become fat beef cattle. That such cattle as those replevined by the plaintiffs would, at that season of the year, have brought more at Dawsonville, and could have been sold to a greater advantage to the cattle men in the surrounding country than they were afterwards sold in Chicago.

Defendant also introduced evidence tending to show that the cattle were recklessly handled by the plaintiffs after they were delivered into their possession by the marshal.

That the commission men in Chicago who handled the cattle did not sell them to the best advantage, and that such cattle would have realized much more if they had been disposed of differently by the plaintiffs and their agents.

Defendant introduced evidence tending to show that when he

drove the cattle to Dawsonville, Missouri, he demanded of the plaintiffs that they pay him for the food and care of the cattle while in his hands, and they refused to allow him anything whatever at that time or at any time.

Defendant introduced evidence tending to show that the plaintiffs' cattle, when delivered to him at Dawsonville, Missouri, in 1880, were of the value of $25; that at the time they were taken from the defendant at said place by the marshal they were at least of the value of $44 64/100 dollars per head; that between the 1st of November, 1881, and the 1st of December, 1881, they ate 18,480 bushels of corn; that corn was worth between the last said dates, at plaintiffs' premises, between forty and fifty-eight cents per bushel. That plaintiffs' cattle increased in weight between the last said dates 15 and ½ pounds each.

71 Defendant also introduced evidence tending to show that plaintiffs' cattle, while in his care, had eaten a great quantity of hay and straw, and during the summer and fall of 1881 had consumed the grass and pasture off of several thousand acres of land, and that at all times while in his custody, they were herded, guarded, and fed by men employed by him, to the number averaging between twenty-five and forty.

Defendant further introduced evidence tending to prove that plaintiffs knew of the manner in which said cattle were handled while they were at Rock Creek station and vicinity in the month of October, 1880, and of the want of feed and water they had suffered from at that place, and the kind of water they had drunk at Rock Creek Valley and Soda Lakes, and of the severe, stormy, and extreme cold weather prevailing there at that time, and of the death of a portion of said cattle from such exposure, want of care and food, and bad water while in that vicinity, and of the delays in shipment of said cattle; and that defendant and said Bass were not informed by plaintiffs of any of said facts, or that defendant or said Bass knew anything thereof at the time defendant received said cattle under said contract, and that defendant at the time he received said cattle supposed they were of an average lot in age, flesh, and quality to the portion of said Teal & Co.'s herd which arrived at Council Bluffs on the 17th day of October, 1880; that the cattle of the sample lot received Oct. 17th, 1880, weighed on an average one thousand and one pounds, and that the thirteen hundred head received by defendant under his contract

72 weighed 1,250,390 lbs., an average of 950 lbs. and a fraction, and that the two hundred head of said cattle, weighed to defendant with the 1,000 head, weighed 174,650 lbs., an average of 837 lbs. and a fraction.

Defendant further introduced evidence tending to prove that while defendant had said cattle at Dawsonville ready for delivery to plaintiffs from the 2nd to the 7th days of December, 1881, the defendant expended two hundred dollars for feeding said cattle, and that defendant had said cattle fed and watered regularly.

Defendant introduced evidence tending to prove that he paid railroad freight on said 1,500 cattle from Council Bluffs, Iowa, to Daw-

sonville, Missouri, at different times from November 4th, 1880, to the amount of $1,169.50.

Defendant introduced evidence tending to prove that none of the 1,500 cattle received by him from plaintiffs were lost, stolen, or strayed.

Defendant also introduced evidence tending to prove that prior to the 1st day of December, 1881, that the plaintiffs had entered into an agreement with Wood Bros., cattle commission merchants, of Chicago, Ill., to turn said cattle over to them upon their, the said Wood Bros., furnishing a replevin bond to enable the plaintiffs to replevy said cattle at Dawsonville, and that said cattle when replevined at Dawsonville were then and there turned over to an agent of Wood Bros., who was there for the purpose of receiving them, and that thereafter the plaintiffs had no control over said cattle or their sale.

73 Plaintiffs, in rebuttal, offered evidence tending to prove that the Oregon trail cattle of plaintiffs, while at and in the vicinity of Rock Creek station, in Wyoming, were carefully handled, and did not suffer and were not injured from the use of alkali water in the Seven Miles Springs and Soda Lakes. That said water was of good quality, and used by all the stockmen for their cattle, bringing Western cattle over the trail and resting them there, and had been so used by the herds for years, and amounting to many thousands of cattle, that had been driven to that vicinity in the fall of 1880 without injury to them; but, on the contrary, that said water was wholesome. That Western cattle were used to drinking that kind of water, and that alkali acted like salt on their stomachs, and the cattle could not thrive without it.

Plaintiffs further introduced testimony tending to prove that of said 3,007 of the Oregon trail cattle of plaintiffs, including the drag band, there were shipped from Rock Creek to Council Bluffs, arrived there, and sold or otherwise disposed of by plaintiffs, twenty-nine hundred and ninety-one head, including the fifteen hundred head of defendant, and that the average weight of all of said cattle was 944 pounds per head, and that all of the cattle that died on shipment to Council Bluffs, or were down in the cars, were of the last shipment of the "drag band," except four or five.

Plaintiffs further introduced evidence tending to prove that no change of the written contract of Nov. 3rd, 1880, was made by plaintiffs.

74 Plaintiffs further introduced evidence tending to prove that defendant had made statements and admissions from time to time after said alleged change of contract tending to prove that said written contract was still in force according to its terms, and that plaintiff and defendant acted and operated under their said written contract.

Plaintiffs further introduced evidence tending to prove that of the 260 of said cattle which defendant claimed had died twenty-six were sold by defendant at different times during the winter of 1880 and spring and summer of 1881, and that others of the cattle were lost or unaccounted for.

Plaintiffs further introduced testimony tending to show that said cattle were not injured or damaged in any way by the fire which plaintiffs caused to be built near the pens where the cattle were held on the nights of November 30th and December 1st, 1881; that they did not shrink any in weight from said cause.

Plaintiffs further introduced testimony tending to prove that the general reputation of defendant in the neighborhood in which he lived, for truth and veracity, honesty and fair dealing, was bad, and that defendant was not to be believed under oath in a case where he had any pecuniary interest, and that defendant was a dishonest man and a rascal.

Plaintiffs further introduce- testimony tending to prove that defendant had not offered or tendered to plaintiffs the hides of the dead cattle, or any of them, and that the tender or offer of said hides was not waived by plaintiffs.

75 Defendant then offered evidence tending to prove that his reputation for truth and veracity and fair dealing in the neighborhood where he lived, and also where he was known was good, and that the witnesses so testifying would believe him under oath in a matter in which he had a pecuniary interest, and that defendant was an honest man and not a rascal.

This was all the evidence in the case.

Plaintiffs thereupon prayed the court, in writing, to charge the jury in their behalf, as follows:

1. If Mr. Bass, the referee named in the contract which has been read in evidence, determined that the cattle delivered to and received by Bilby were, as to age, flesh, and quality, such as Bilby was to have under said contract, then Bilby is bound by that determination, unless it has been shown by the evidence that Bass in passing upon the age, flesh, and quality of said cattle was influenced by representations made by plaintiffs as to their age, flesh, and quality, and that such representations were false.

But the court, against plaintiffs' objection, then and there refused to so charge the jury as prayed for in said first instruction; to which action of the court in refusing to charge the jury as prayed for in said first instruction plaintiffs then and there at the time duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

2. That although the jury may believe from the evidence
76 that the cattle received by the defendant were in fact thinner in flesh than the lot which had arrived at Council Bluffs October 17, 1880, yet if their condition as to flesh was known to defendant at the time he received them, and that notwithstanding their condition as to flesh, he received them under said contract, it is too late now to complain.

But the court then and there refused to so charge the jury as requested in said second instruction; to which action of the court in

refusing to charge the jury as prayed for in said second instruction plaintiffs at the time then and there duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

3. By the contract read in evidence the defendant undertook to receive the cattle mentioned therein, and to winter them well on hay, straw, and stock-fields until grass should come in the following spring, viz., to feed them well during the winter on hay, straw, and stocks, and keep them in enclosed pastures on good grass until August 15th, 1881, and thereafter to feed them all the corn they could eat on each and every day until delivered to plaintiffs; and that if said cattle remained in his posession until Dec. 1st, 1881, to so feed and care for them that their average weight should be increased four hundred and fifty pounds; and that plaintiffs were to pay defendants five cents per pound for their increased weight. And if the jury shall find from the evidence that the defendant did not feed and care for said cattle as he was to do by the said contract, and that notwithstanding that said cattle remained
77 with him until December 1st, 1881, he did not so feed and care for them that their average weight was increased four hundred and fifty pounds, then under said contract the defendant is not entitled to anything for feeding said cattle.

But the court then and there refused to so charge the jury as requested in said third instruction; to which action of the court in refusing to charge the jury as prayed for in said third instruction plaintiffs at the time then and there duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury, as follows:

4. By the written contract read in evidence the defendant was bound to account to and pay plaintiffs for each one of the cattle lost, strayed, or stolen, or which died through defendant's neglect or carelessness.

But the court then and there refused to so charge the jury as requested in said 4th instruction; to which action of the court in refusing to charge the jury as prayed for in said fourth instruction plaintiffs at that time then and there duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

5. The contract read in evidence, made November 3rd, 1880, in respect to the cattle in question, must control in this case, unless the same was thereafter modified or changed upon some new consideration; and if the defendant relies upon a modification or change of the contract the burden is upon him to show by a preponderance of evidence that such contract was modified or changed.

78 But the court then and there refused so to charge the jury as requested in said fifth instruction; to which action of the court in refusing to charge the jury as prayed for in the fifth in-

struction plaintiffs then and there at the time duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

6. The defendant in answer claims that it was found that said cattle could not be wintered on hay, straw, and stalks, and that the written contract which has been read in evidence was modified by an oral agreement, under which, defendant says, he was to put the cattle on corn at that time, and feed them corn until they had sufficiently recovered from the injuries the cattle had received, and had become sufficiently built up so that those that survived could be fed on hay, straw, and corn-stalks, and that the time they were so fed corn in the winter of 1880 and 1881 should be deducted from the time they were to be fed corn during the summer and fall of 1881; and that all right plaintiffs had under the written contract to require defendant to so feed and care for said cattle that they would increase on an average four hundred and fifty pounds should be and was waived; and if defendant relies on such modification of said contract as an excuse for not complying with the written contract, it is incumbent upon him to satisfy the jury by a preponderance of the evidence that the contract was so modified, and in determining whether
79 the contract was so modified the jury should take into consideration the testimony in the case as to whether the cattle up to the time said contract is said to have been modified had been well fed on hay, straw, and stalks, and whether such feed had proven sufficient to sustain and keep said cattle, and whether defendant was able or prepared to feed them well on hay, straw, and stalks, and whether it was to the mutual advantage of the parties that they should be fed on corn and stalks instead of hay, straw, and stalks, and all the other evidence in the case.

But the court then and there refused to so charge the jury as requested in said 6th instruction; to which action of the court in refusing to charge the jury as prayed for in said 6th instruction plaintiffs then and there at the time duly excepted, and still except.

Plaintiffs thereupon prayed the court, in writing, to charge the jury further, as follows:

7. If the defendant failed and neglected to feed and care for plaintiffs' cattle in the manner he was to feed and care for them under the contract between plaintiffs and defendant, in force at that time, and during such time any of said cattle were lost through such negligence of defendant, then he is liable to plaintiffs for what said cattle would have been worth at the time plaintiffs were entitled to have them delivered to them under their contract. That is to say, on the 1st day of December, 1881.

80 But the court then and there refused to so charge the jury as requested in said 7th instruction. To which action of the court in refusing to charge the jury as prayed for in said 7th instruction plaintiffs then and there at the time duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

8. If the jury shall find that the plaintiffs are the owners of the cattle in question and were entitled to the possession thereof on the 1st December, 1881, and that on demand being made defendant refused to deliver said cattle to plaintiffs, and that plaintiffs were compelled to and did thereafter take said cattle by this writ of replevin, and if said cattle were injured by the negligence of defendant between the date of such demand and the time they were taken on said writ, then plaintiffs are entitled to receive such damages as they may have sustained by reason thereof in case No. 405.

But the court then and there refused to so charge the jury as requested in said 8th instruction. To which action of the court in refusing to charge the jury as prayed for in said 8th instruction plaintiffs at the time then and there duly excepted, and still except.

Plainliffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

9. It was the duty of the defendant under the written contract in evidence, if the same was not altered, to preserve the hides of all cattle that died while the cattle were in custody of defendant under said contract, until December 1st, 1881, and also the ear-marks of all such dying as had ear-marks. The hides and ears, if thus preserved, would, however, be only evidence of the death of such cattle, and not of the cause or manner of their death, nor would they show that any such cattle died from causes unavoidable on the part of defendant.

But if the jury believe, from the evidence that said hides were not preserved by defendant for exhibition to plaintiffs, December 1st, 1881, and that such preservation and exhibition were not waived by any of the plaintiffs, then burden is on the defendant to show, to the satisfaction of the jury, by a preponderance of evidence, both how many of said cattle died, and that their death resulted from causes unavoidable on the part of defendant, and for all dying which are not so accounted for defendant is responsible to plaintiffs.

81 But the court then and there refused to so charge the jury as requested in said 9th instruction. To which action of the court in refusing to charge the jury as prayed in said 9th instruction plaintiffs at the time then and there duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

11. In estimating the damages, if any, to which the jury may believe, from the evidence, plaintiffs are entitled for cattle lost, strayed, and stolen, and taken and converted by defendant to his own use, and for cattle which died through the neglect or carelessness of the defendant, or of his agents or employees, while defendant kept said cattle from the time he first received them until

December 1st, 1881, the jury will allow plaintiffs, as the value of said cattle, what they would have been worth alive at Dawsonville, Missouri, December 1st, 1881, had they been increased in weight four hundred and fifty pounds on an average over and above what they averaged when defendant first received them.

But the court then and there refused to so charge the jury as requested in said 11th instruction. To which action of the court in refusing to charge the jury as prayed for in said 11th instruction plaintiffs at the time then and there duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to
82 charge the jury further, as follows:

12. In estimating the damages, if any, which the jury may believe, from the evidence, plaintiffs are entitled to under the written contract read in evidence, if they believe said contract was not altered by a subsequent oral agreement between plaintiffs and defendant, the jury will find the difference between what the cattle living and received by plaintiffs were worth at Dawsonville, Missouri, December 1st, 1880, as weighed by defendant, less what the increased weight put on them was reasonably worth and what said cattle would have been worth there, weighed in the manner specified in said written contract, at said date, if they had been increased in weight four hundred and fifty pounds each on an average above what they weighed when defendant first received them under said contract, less five cents per pound on their increase.

They will further ascertain from the evidence what number of the cattle received by defendant under said written contract were lost, strayed, and were stolen and converted by defendant to his own use, and what number died through the neglect or carelessness of defendant, or of his agents or employees, while said cattle were in defendant's custody under said contract up to December 1st, 1881, and they will find what would have been the value of all such cattle
83 at Dawsonville, Missouri, December 1st, 1881, had they at that time and place been delivered alive, and allow such value to plaintiffs as part of their damages.

But the court then and there refused to instruct the jury as requested in said 12th instruction. To which action of the court in refusing to charge the jury as prayed for in said 12th instruction plaintiffs at the time then and there duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

14. The jury are the sole judges of the weight of the evidence and of the credibility of the witnesses, and may give to the testimony of every witness such weight as they deem it entitled to, and if they believe that any witness has willfully testified falsely to any material fact in controversy on the trial of this case, they are at liberty to disregard the whole of the testimony of such witness.

But the court then and there refused to so charge the jury as requested in said 14th instruction. To which action of the court in

refusing to charge the jury as prayed for in said 14th instruction plaintiffs at the time then and there duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

84 16. In case No. 405, by the written contract read in evidence, if not altered by any oral agreement, the right of the defendant to keep the cattle terminated on the 1st day of December, 1881, and if the jury believe from the evidence that plaintiffs on said day, in pursuance of a notice in writing served on defendant at least ten days before said date demanded of defendant the possession of the cattle, the defendant on or after such demand being made, failed or refused to deliver said cattle to plaintiffs or their agent, then plaintiffs had a right to replevy said cattle and entitled to damages for their detention and for all injuries done to them, and for all deterioration in their value from the time said demand was made on December 1st, 1881, until they were taken by the marshal under the writ, and defendant would not, during the time he so detained them, be entitled to any compensation for feeding or caring for them.

But the court then and there refused to charge the jury as requested in said 16th instruction. To which action of the court in refusing to charge the jury as prayed for in said 16th instruction plaintiffs then and there at the time duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

17. Should the jury find for the plaintiffs under the foregoing instructions, then they may take into consideration the sum of $1,000.00 paid to defendant by plaintiffs on September 1, 1881, in arriving at the amount of damages due to plaintiffs.

85 But the court then [and] there refused to so charge the jury as requested in said 17th instruction; to which action of the court in refusing to charge the jury as prayed for in said 17th instruction plaintiffs at the time then and there duly excepted, and still except.

Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

18. Before the defendant can set up an oral agreement to alter the written contract read in evidence, and to avail him as an excuse for the non-performance of said written contract, he must not only clearly establish the existence and terms of such oral contract, but he must also show that he has duly performed all the terms and conditions thereof required to be performed on his part. He cannot violate it and then claim the benefits of it.

But the court then & there refused to charge the jury as requested in said 18th instruction; to which action of the court in refusing to charge the jury as prayed for in said 18th instruction, plaintiffs at the time then and there duly excepted, and still except.

86 Plaintiffs thereupon further prayed the court, in writing, to charge the jury further, as follows:

20. The defendant held the cattle, as the bailee of plaintiffs, up to and on the 1st day of December, 1881; therefore plaintiffs had the right to terminate such bailment by demand for the possession of such cattle, and if the defendant refused to deliver up such cattle to plaintiffs on such demand being made, without then and there defining and claiming a lien upon the same, the plaintiffs have the right to take such cattle from defendant's possession upon their writ of replevin, and are entitled in such replevin suit to such damage as the jury may believe, from the evidence, was done to such cattle between the 1st day of December and the time said cattle were taken on such writ by defendant's neglect or refusal to properly feed or care for the cattle during such time, or any other depreciation in value during such time.

But the court then and there refused to so charge the jury as requested in said plaintiffs' instruction; to which action of the court in refusing to charge the jury as prayed for in said 20th instruction plaintiff at the time then and there duly excepted, and still except.

87 The court thereupon charged the jury as follows:

Let us, in the first place, bring before our mind the several parties plaintiffs and defendant to the suits. We find from the testimony in the cases that four gentlemen, Teal, Coleman, Todd, and Storrs, residing in the State of Oregon, in the spring of 1880, formed a copartnership for the purpose of driving about 3,000 head of cattle which they owned eastward, to dispose of them in such a manner as to them seemed best. The partner, Teal, seems to have kept in person and through his son a general supervision of these cattle, besides conducting the financial concerns of the company. The partner, Storrs, took but little personal interest, while the partners, Coleman and Todd, had the actual control and handling of the cattle from the time they left Oregon until they arrived at Rock Creek, on the Union Pacific railroad, in Wyoming Territory, from which place they were transported by rail to Council Bluffs. The monied interest which the several partners had in the venture were, Teal, one-third; Coleman, one-third; and the two partners, Todd and Storrs, one-third jointly. The partners, it appears, were buyers, drivers, and dealers in cattle.

On the other hand, we have Bilby, residing near Fairview, in Nodaway county, in the State of Missouri. He is a farmer on a large scale, a raiser, feeder, and dealer in stock, a merchant, and having ample means to carry out the agreement he entered into with Teal & Co. These parties, plaintiffs and defendant, on the 3rd day
88 of November, 1880, entered into the written agreement in evidence. The object of this agreement, so far as it can be gathered from its terms, seems to have been, on the part of Teal and Co., to have 1,500 of the cattle driven from Oregon to Rock Creek and shipped to Council Bluffs, taken care of and fed during the winter of 1880 and 1881, and the summer and fall following, in such a

manner as to secure an average weight of 1,400 pounds each, in case they were left with Bilby up to the 1st of December, 1881. Bilby, on his part, seems to have entered into the contract for the purpose of realizing a reward of five cents per pound for every pound of flesh he put upon the cattle by feeding them. The parties to the contract are brought together by Bass, a partner of the cattle firm of Rosenbaum, Bass & Co., at Council Bluffs, Iowa, and a preliminary agreement is entered into by Bilby with the son of Teal, providing that Bilby should take 1,500 of the cattle driven to Rock Creek, such cattle to be "similar" in age, flesh, and quality to a train load that arrived at Council Bluffs, Iowa, Sunday, October the 17th, 1880. Mr. Bass, of the firm of Rosenbaum, Bass & Co., is made the judge of the cattle, whether or not they are an average lot with the train load that arrived on Sunday, October 17th, 1880. If the quotation here made from the contract was not fully agreed on between Bilby and the son of Teal, it resulted in what is now found to be the contract in suit. Bilby had seen the cattle which were to be the sample lot.

89. After this preliminary understanding between the son of Teal and Bilby the son proceeds to Rock Creek, and on the 3rd day of November, 1880, Teal, Senior, and Bilby meet at Council Bluffs and the contract in evidence is agreed on and signed by the parties. On the same evening, or the next day, 1,300 of 1,500 head of the Bilby cattle passed on by Bass were weighed and shipped from Council Bluffs to Dawsonville, Bilby going with one of the shipments. Under the contract the cattle are "to be delivered to John S. Bilby, at Dawsonville, Missouri." And it is further agreed that "if the said John S. Bilby shall pay the freight on said cattle from Council Bluffs to Dawsonville, Missouri, he shall be allowed ten per cent. interest on said amount and the amount to be paid on delivery of cattle to J. Teal & Co." The cattle, as they arrived at Dawsonville, were unloaded, taken care of, and driven to the farm of Bilby, as testified to.

During the winter of 1880 and the summer and winter of 1881, Coleman, one of the partners, is found more or less with the cattle. The written contract between Teal and Bilby provides that Bilby "agrees to take these cattle and winter them well on hay, straw, and stock fields until grass comes; to be kept in enclosed pastures on good grass until the 15th of August, 1881, after which date on each and every day they shall be fed all the corn they will eat
90 until delivered to J. Teal & Co." It is claimed by Bilby that in the first half of December, 1880, the stipulations and conditions of the contract last quoted were, by verbal agreement between himself and Coleman, so charged that the cattle were to be fed of corn during the winter of 1880 and 1881, and that in consideration of Bilby's doing so he was to be released from the stipulated weight of 1,400 pounds, and as a further consideration that the time which he so fed corn in the winter of 1880 and 1881 was to be deducted from the time which Teal & Co. may leave the cattle to be fed, namely, the first of December, 1881. Under the contract Teal and Co. agree "to advance one thousand ($1,000) dollars to John

S. Bilby on the first day of September, 1881, to be applied to payment of weights added to cattle on the last delivery." The amount thus stipulated for was paid by Teal & Co. and one receipt endorsed on the contract which Teal had made, in addition thereto, a separate receipt given.

A notice was served by Bilby on Coleman, notifying him that on the 31st day of October, 1881, he would proceed to weigh the cattle for the purpose of delivering them on payment of dues for care and feeding, as he, Bilby, claimed he had a right to do under the verbal contract made between himself and Coleman, modifying the written agreement. Nothing was done under this notice except the weighing on the 31st day of October, 1881, of which Teal & Co. took no
91 notice. On the first day of December, the day fixed in the written contract for the delivery, Teal & Co. demanded their 1,500 head of cattle of Bilby, 1,229 or 1,232 of the cattle were weighed on the 1st and 2nd of Dec. and driven to Dawsonville, and after being held there some days by Bilby were taken by a writ of replevin issued from this court, and the possession of them delivered to Teal & Co. on their giving bond. The matter thus got into the court, and the action known as the replevin suit commenced. In this action, Teal & Co., as plaintiffs, allege that they are the owners of the 1,500 head of cattle in the controversy, and that Bilby wrongfully retains them, to their damage 25,000 dollars. They, Teal & Co., by Joseph Teal, one of the partners of Teal & Co., and a plaintiff in this action, makes an affidavit swearing the 1,500 cattle are worth 75,000 dollars, that they are wrongfully detained by Bilby, and that they (Teal & Co.) will be in danger of losing their said property unless it be taken out of the possession of Bilby or otherwise secured. Without such an affidavit Bilby could not have been deprived of the possession of the cattle. To this action Bilby appears and answers that Teal & Co. are not entitled to the possession of the cattle; that the same were delivered to him by Teal & Co. to be fed and cared for; that 268 of the cattle died without any fault or negligence on his part; that he continued to feed and care for the rest until the same were taken from him by
92 virtue of the replevin suit. That he is entitled to 30,000 dollars for feed and care of the cattle, except 1,000 dollars paid; that he is entitled for monies laid out for freights paid, and asks judgment for damages, money laid out and a return of the cattle. In this action (replevin) the question is, who is entitled to the possession of the cattle? The ownership not being disputed, the solution of this question depends on another, and that is, was there anything due to Bilby on account of feeding and care of the cattle and the money charged to have been expended? If not, then plaintiffs, Teal & Co., are entitled to a verdict and such damages as they have sustained, under the evidence, by the detention of the cattle from them after the first day of December, 1881, and until they are delivered to them by the U. S. marshal. If, on the other hand, Bilby is entitled to pay for feed and care of the cattle, they must be returned to him, and he (Bilby) is entitled to the damage he has sustained in consequence of the cattle being taken out of his

possession, namely, the trouble and expenses for feeding and caring for them at Dawsonville, as hereinafter further explained. Your allowing of damages in the replevin suit, if you find the issue therein for Bilby is limited as stated, and you cannot allow general damages for the feeding and caring for the cattle, such damages, if any, you are authorized to pass on the second suit between
93 the same parties and growing out of the same contract, to which your attention will now be called.

In this the 2nd suit, the plaintiffs allege that they were the owners of 1,500 cattle, and that, being desirous of having said cattle properly cared for during the winter, spring, and summer of 1880 and 1881, they entered into a contract in writing with Bilby to keep the same for them; that they weighed the cattle to him, and he received them; that the average weight thereof was 950 pounds; that they paid Bilby $1,000 on the first day of August, 1881, as agreed on, and that plaintiffs have fully kept their part of the contract. The plaintiffs in their suit further aver that if said cattle had been well kept, as provided in the contract, up till the first day of December, 1881, they would have increased in weight on an average 450 pounds per head, and that Bilby had agreed to so feed them that they would come up to this average, and that they would have been worth 98 dollars per head to the plaintiffs. They next proceed to state that Bilby failed to keep the cattle as agreed, and that on the 1st day of December he refused, on plaintiffs' demand, to deliver them up, and they have been compelled to bring the replevin suit; that the increased weight of the cattle taken from the defendant average three hundred and twenty-six pounds, and that the cattle were worth forty-four dollars per head only. Plaintiffs further allege that Bilby failed to deliver 271 head of the 1,500 head of
94 cattle delivered to him, and that the cattle not delivered were worth twenty-six thousand dollars. Teal & Co. claim that they have been damaged by Bilby not keeping his contract in the sum of 92,366 dollars, for which they ask judgment against Bilby.

The petition of plaintiffs in the suit set out more at length and in detail, the various failures of Bilby to keep his contract, and you may refer to it for omitted specifications, so many of them have been cited only as will enable me to inteligently speak of their claims.

To this action the defendant Bilby answers, by first denying all the allegations of the plaintiffs' petition, and he next proceeds to declare the facts to be, that he entered into the contract for the keeping of the 1,500 cattle of plaintiffs; that the cattle were to be similar in age, flesh, and quality; to those which arrived on the 17th day of October, 1880, which Bilby had examined; that he, Bilby, relied on the representations as to the conditions of the cattle made by the plaintiffs, and was thus induced to enter into the contract, and agree that Bass, a partner of the cattle firm of Rosenbaum, Bass & Co. at Council Bluffs, should be the judge as to whether the cattle to be turned over to him were up to an average as compared with the sample lot, that the cattle delivered were not in fact up to the aver-
age, though so represented to be by plaintiffs and said Bass;
95 that the cattle had been snowed in and detained at Rock Creek, from the 17th to the 30th of October, that they had

been starved until many of them died, and others so frozen and injured that they never fully recovered, of which facts as stated the defendant and Bass were ignorant, and were concealed by plaintiffs from defendant and said Bass; that the treatment the cattle received was the cause of many of them afterwards dying; that though they were carefully shipped, handled, and cared for, two hundred and sixty-eight of them died, and none of them strayed or were stolen, and none died through the neglect or carelessness of defendant, but that they died from unavoidable causes. Defendant Bilby further alleges that he complied with the contract regarding the preservation of the hides as evidence of the death of such of the cattle as had died, and that he tendered the hides as agreed between plaintiff Coleman, and that since the hides had spoiled. Defendant next set out the amounts of money advanced by him for plaintiffs to pay freight of cattle to Dawsonville, and claims payment thereof with interest.

Defendant next proceeds to set up a verbal agreement that the defendant should put the cattle on corn, and that in consideration of so doing the time the defendant should so feed was to be deducted from the time the cattle were to be fed corn in the fall, and as a further consideration the defendant was to be released from the written contract to in-
96 crease the weight of the cattle 450 pounds. The defendant next alleges that in conformity to the verbal agreement he put the cattle upon corn 75 days, and that on the 27th of September he notified plaintiffs that their cattle were ready for delivery, to which plaintiffs paid no attention, and that in conformity to the notice he weighed the cattle, and that they weighed 1,553,305 pounds; that on the 15th day of November, 1881, defendant received notice from plaintiffs that on the 1st day of December, 1881, they would be ready to receive the 1,500 head of cattle belonging to them; that thereupon defendant made arrangements for weighing and delivering of said cattle; that while doing so plaintiffs caused the cattle to be disturbed, to his, defendant's, injury in the sum of 2,245 dollars. That defendant next proceeds to state that he had 1,232 head of cattle on the 2nd day of December, 1881, at Dawsonville, ready for delivery, and willing to deliver the same on payment of the amount due him for caring and feeding of said cattle, the amounts advanced for freights, and the injury done him by disturbing the cattle before weighing, amounting in all to $29,136.62. Defendant further states that plaintiffs refused to pay him his just demands and receive the cattle, and that, in consequence, the cattle were kept at Dawsonville up to the 9th day of December, 1881, when they were taken out of his possession by the U. S. marshal under a writ
97 from this court and delivered into the possession of plaintiffs.

With the outlines of the allegations of plaintiffs in their suit for damages, and the outlines of defendant's answer thereto and his allegation as to the modification of the written contract by verbal agreement before us, we can enter upon the consideration of the law as applicable to the facts, which I shall now proceed to do.

And, first, of the written contract. It has already been said that its object, as deducted from its provisions, must be declared to have been the taking care of and feeding of the cattle, so as to increase their

weight from 950 pounds to 1,400 pounds per head; in other words, add 450 pounds, as provided in the written contract. The plaintiffs, in their statement of the case, say that the increase of weight spoken [of] was for the purpose of making them marketable, and that in consequence of their not being marketable at 1,276 pounds, losses, aside from the deficiency in weight, has been incurred by them. The contract is silent as to what was to be done with the cattle after they were fed, and hence the alleged intended manner of dealing with — by the plaintiffs can have no bearing in the matter. You may well come to the conclusion from the evidence that the plaintiffs, if they had received the cattle in the order anticipated, they would have dealt with them as their interests would have suggested, put them on the market for beef, in whole or in part, or still further feed them.

98 The existing market, its future prospect as to rise or fall, the cost of longer feeding them, might all have constituted factors in their determination as to what they would have done with the cattle. Enough; the contract says nothing about the future of the cattle, and it would be idle for you to speculate about it. The written contract provides that Bilby's cattle were, on an average, to be similar to a lot of the Teal herd, which had arrived on the railroad on the 17th day of October, in age, flesh, and quality; and Bass, a member of the cattle firm of Rosenbaum, Bass & Co., which firm handled the Teal cattle on commission, was made the judge as to whether the cattle of Bilby's came up to the average of the sample lot. It may have been unfortunate on the part of Bilby to have agreed to an arbitrator who was in the interest of Teal, by way of commission in the cattle on which he was to pass; yet that was for Bilby to determine, and he cannot complain of the acts of Bass, if honestly discharged by him. It is only in case Bass was himself deceived by plaintiffs, in not putting him, Bass, in full possession of the knowledge possessed by them, and necessary for proper discharge of his, Bass', duties as arbitrator, that you can go behind Bass' acts. Then, if the cattle of the Teal herd were infected by a disease incurred through careless handling, want of sufficient or proper food or water, and such disease could not be discovered by a careful examination, which Bass is presumed to have made, in such

99 a case the plaintiffs were bound, if they knew of such disease, to disclose it to Bass or Bilby, and their failure to do so was a fraud upon Bilby; and if damages have resulted to him, Bilby, in consequence, he is entitled to recover them in this action. Bass, under the contract, was to judge of the age, flesh, and quality of the cattle between the parties, as already stated, but he was not made the judge as to the manner in which the cattle were to be weighed, that being stipulated for in the written contract. Under it the cattle arriving before noon of any one day were to be cut off from food; in other words, put upon shrinkage the same day in the evening at 7 o'clock, and remain without food or water until 7 o'clock the following morning, when they were to be weighed. Cattle arriving after noon of any one day are to be cut off from food and water on the evening of the following day. It is apparent from these

provisions of the written contract that the cattle were not to remain in the stock yards on feed longer than was necessary to put them upon shrinkage, as stipulated. The provisions here cited Bass, who had the handling of the cattle, had not a right to change. He had nothing to do with them, except to see that they were complied with. If the cattle were kept in the stock yards on food longer than necessary to put them upon shrinkage, or if the cattle were not cut off from food and water, as provided in the contract, and this occurred without the knowledge and consent of Bilby, and he (Bilby)
100 was damaged in consequence thereof, he is entitled to recover such damage in this action as he has shown by the evidence he has suffered. Bilby could waive the conditions as to feeding before weighing the cattle, or not insist on them; and if he knew that the contract was violated in this respect, you may infer such waiver if he failed to protest. Bilby had a right to presume that Bass would do his duty in the premises, and was not bound to see to it that he (Bass) did as required by the contract. It is only from Bilby's knowing the violation and not objecting that the inference of waiver spoken of can be drawn.

The written contract provides "that Bilby shall take the cattle and winter them well on hay, straw, and stalk fields until grass comes; to keep in enclosed pastures, on good grass, until the 15th day of August, 1881, after which date on each and every day they shall be fed all the corn they will eat until delivered to J. Teal & Co." The provisions as to wintering them well on hay, straw, and stock fields will receive at your hands a reasonable construction. They are meant to convey the idea that the cattle should have a reasonable quantity of one or the other of the kind of food mentioned, so as to enable them to pass through the winter in reasonable good condition. Bilby was not thereby prevented from feeding them on grass, dry or green corn even, or partly substitute such food for the food named in the contract, so that the object, the
101 keeping of the cattle in reasonably good order, was secured. It will not do to stick in the bark in expounding the contract, for if you did, what would have become of these cattle? There are no provisions in the contract for watering them. Yet no one has contended that they were not to be watered. It belongs to the keeping and caring for them. The cattle are to be kept on good grass, in enclosed pastures. The object of the latter provision, no doubt, was to keep the cattle from running at large. It is for you to say whether the herding of a portion of them on open prairie a part of the time, when such prairie is found to be fenced all around, except the road openings, is a compliance with the provisions of the contract.

Another provision of the contract is "that Bilby is to be responsible for all cattle lost, strayed, or stolen; and for any dying through the neglect and carelessness of the said John S. Bilby, and dying through causes which are unavoidable, shall be shared thus: J. Teal & Co. to bear the loss of the steer, and John S. Bilby the feed. If any steer die, John S. Bilby shall preserve the hide as evidence of death, and the ears, if there are any ear-marks." I remember no

evidence of any of the cattle having strayed or having been stolen. If there is evidence of any of the cattle having been lost, strayed, or stolen without having been recovered, Bilby is liable for such to the plaintiffs.

102 Of the missing or lost ones, if any, I shall speak further hereafter. If any cattle die through unavoidable causes, plaintiffs to lose the steer and Bilby the feed. What are unavoidable causes? They may [be] said to be the incidents which occur over which the party has no control.

Bilby was bound to take reasonable care of the cattle with reference to the condition in which he took them. What is reasonable care under the circumstances testified to, you are the judge of. If he did not take such reasonable care, and any of the cattle died in consequence, he is responsible for them to the plaintiffs. It was suggested in argument and shown that more or less of Bilby's cattle were running with and were taken care of the same as the Teal cattle. This testimony must be considered with reference to the condition of the cattle. Strong cattle may get along with and do well with treatment under which weaker would suffer. The distinction here drawn had special application to the watering of some of the cattle.

Bilby, under the written contract, was to preserve the hides of the cattle which died and the ears of any which had ear-marks. Under this provision Bilby was bound to preserve the hides of all the cattle which died; and unless he has done so, he is bound to account for the whole of the 1,500 cattle, less such as he has preserved the hides of, or the preservation of them was agreed to be waived.

103 There is testimony showing the number of hides preserved by Bilby, and as to an agreement with plaintiff Coleman waiving the preserving of some of them. If the whole of the steers which are claimed to have died have thus been accounted for to your satisfaction, Bilby cannot be held responsible, provided they all died through unavoidable causes, and not through the neglect or carelessness of Bilby, as already instructed. The offer to count the hides claimed by Bilby to have been made to Coleman, if made as claimed, and the count actually made, as testified to, if satisfactorily proven, may be taken by you as showing that Bilby had the number of hides claimed. There are no provisions in the contract where the hides of cattle which had died should be counted, and the reasonable construction thereupon is that the hides preserved should be counted at the time, and with a view of making the hides themselves available for use or sale.

We have thus passed over the written contract between the parties. Such portions as have not been considered will be touched upon in the examination of the claimed verbal agreement, by which the written contract is alleged to have been modified. This modification is set up by Bilby, and he is bound to prove it. The written contract speaks for itself, and must prevail, unless a change and modification of its terms are proven to your satisfaction.

In attempting to arrive at a satisfactory conclusion regarding

104 the modification or change of the written contract a natural

inquiry is, Was there a reason or necessity for the change? The parties alike interested in the preserving of cattle were upon the ground. The cattle were dying in large numbers from some cause. Would a change of food suggest itself to meet the contingencies? If so, there would be a reason and motive for the change. A contract is claimed by Bilby to have been made changing some feature of the existing written contract. Bilby affirms that change. Coleman denies it. An unimpeached witness is called by Bilby at the time of the claimed making of the change, to whom he, Bilby, repeats the argument in the presence of Coleman, and the witness testifies to the change in court. A number of the witnesses testify that the cattle were put on corn about the time of the claimed change. The rest of the testimony bearing on the question consists of acts and admissions claimed as made by the parties to the modification, and is for and against the change. From the testimony pertaining to it you must determine, first, whether there was any change; and if you find that a change was made, what that change was. If you find that there was no modification or change, then the written contract remained in full force. If you find there was a modification or change of the written contract by the verbal agreement as claimed by Bilby, in that case you will proceed
105 to inquire what was done under it. And here the question arises, Did Bilby live up to the change or modification, if it was made? Though you may find that a modification of the written contract was made by verbal agreement, as claimed by Bilby, yet if he, Bilby, did not live up to and comply with the change made, he cannot have the benefit of it. You will observe that the change in the written contract, if made, brings up the question whether Bilby shall be paid for the care and expenses of feeding the cattle from the time of weighing them, under the notice given to Coleman, or shall he be satisfied with the additional weight put upon the cattle afterwards, as shown by the December weight. It is obvious from the testimony that the additional weight put upon the cattle between the two weighings did not pay the expenses the cattle caused. If, under the new agreement, the plaintiffs were bound to take the cattle at the time of notice and first weighing, in that case Bilby will be entitled to the expenses of feeding them after the first weighing in December, deducting therefrom the value of the increased weight between the weighings.

Regarding the attempt to impeach the character of Bilby for truth, veracity, honesty, and fair dealing, it may be remarked that plaintiffs had the right to show that Bilby, who testified in the case, could not be believed on oath. It is usual when such attempts are made to stop here; but plaintiffs went further, and undertook to
106 show also that he, Bilby, is dishonest. How he, Bilby, met these charges you heard, and are able to determine the question whether his testimony shall be affected thereby. While this far everything is legitimate and proper, there is one view against which I warn you. This view is that the attempt to attack the honesty of Bilby should not be allowed to affect your mind, if at all, further than as related to this case. A man suing another must have a

good cause of action. He cannot turn around and say that I have no cause of action, yet you are a rascal, and therefore I am entitled to receive a judgment, and take your property to satisfy it. What is intended by this allusion to the attempt to impeach is to direct your mind to the proper application of the testimony.

Having thus reviewed the law as applicable to the testimony at some length, what remains to be done is to present to you the theories and claims of the parties in each of the cases. Both suits, the replevin suit instituted on the first of December, 1881, and the suit upon the contract for damages brought on the 23rd of December, 1881, are suits in which Teal & Co. are plaintiffs and John S. Bilby is the defendant. In the first of these suits, the action of the replevin, the plaintiffs seek to recover the possession of the 1,500 head of cattle which they delivered to Bilby for the purpose of feeding. There is no dispute as to the title of the cattle, they belonging to Teal & Co.

107 Bilby claims the possession as rightfully belonging to him until he is paid for the care and expenses he has been at in feeding and caring for the cattle. The claim made by defendant is denied by plaintiffs, they virtually saying you, the defendant, have no such rightful claim, but under the pretense of it wrongfully withhold the possession of the cattle from us. Now, if you shall find from the testimony, and under the instructions of the court, that defendant, in caring for and feeding the cattle as he did, damaged them in value rather than increased it, you should find the issue in the first, the replevin suit, for the plaintiffs, and assess damages in their (pl'ffs') favor sufficient to cover losses incurred by being deprived of the cattle from the first of December up to the time they (pl'ffs) obtained the possession of them under the writ of replevin.

But if, on the other hand, you shall find from the testimony, and under the instructions as given you by the court, that defendant Bilby was entitled to something for the care and feeding of the cattle as he did, after allowing and deducting therefrom any damages which plaintiffs may have sustained, in that case your are instructed to find the issue in the replevin case for the defendant, and assess his damages in an amount sufficient to recompense him for his trouble, care, and cost of feeding and holding them at Daw-

108 sonville from the 2nd day of December up to the time they were taken out of his (def't's) possession by virtue of the replevin.

In the replevin suit you can only determine whether the plaintiffs or defendant is entitled to the possession of the cattle and the damages as stated. The determination of the amount of damages sustained by one or the other of the parties as to the treatment and caring for the cattle is the subject-matter of the controversy in the second suit, the suit for damages on the contract.

The allegations and claims of plaintiffs in the second suit—the suit on the contract for damages—summarized are that the plaintiffs have performed all the agreements and undertakings of the contract on their part, but that the defendant has failed to keep and

perform his part, whereby plaintiffs have been damaged to the sum of 92,366 dollars.

To this second, the damage suit on the contract, the defendant answers, summarized, alleges that the written contract as originally made was afterwards, by a verbal agreement, modified and changed, and that he has performed all his agreements and understandings under the contract modified; that he is entitled to compensation for the care and feeding of the cattle and to monies laid out and expended for plaintiffs for freight, and asks for a judgement in the sum of $51,981.62.

109 It remains for me to instruct you regarding the rule for assessing damages. Much has been properly said about weights of cattle because it helps us in arriving at the value of the cattle, for that is the real question. The price per pound of cattle of various weights and in different conditions has been considered, because this may aid us also in arriving at the true value of the cattle. Under the claims made by the plaintiffs, and assuming that the written contract under which they claim has not been modified, they would be entitled to the difference in value between the cattle weighing on an average 1,400 pounds and cattle weighing on an average 1,276 pounds, if there be any difference in value. The defendant Bilby would also be liable for the number of cattle not properly accounted for, valued at the value of a 1,400-pound steer. Whatever value you fix on the cattle must be fixed with reference to the value of cattle then on the 1st day of December, 1881, at Dawsonville. Under the written contract the plaintiffs are entitled to the hides of the cattle which unavoidably died. Unless you find that a tender of these was made by defendant to plaintiffs, in which latter case the defendant would not be liable for them, there is no proof before you as to the value of the hides, and in order to recover their value the plaintiffs would have to show it; the hides seem to be out of the question even if defendant's tender was invalid.

110 The foregoing is the claim of the plaintiffs for damages, and they will be ascertained by you under the evidence and the instructions of the court as given you in the manner stated, if the written contract has not been changed or modified.

The claims of the defendant are as follows:

Assuming the written contract to have been modified, and that defendant performed his contract as modified, he claims for the increased weight of the cattle from 950 to 1,276 pounds. He further claims that under the modified contract he had a right to turn over the cattle on the first day of October or earlier, and asks pay for feeding and caring for the cattle from the first day of October, when he tendered them, to the first day of December, when he drove them to Dawsonville, deducting therefrom the value of the increased weight between the two weighings. He also claims for money advanced for and on account of freight charges advanced on the cattle, with interest at 10 per cent. from the date of payment. If you find any amount due from plaintiffs to defendant, defendant is entitled to interest for the amount you may find due him from the time the

possession of the cattle was taken from him to this day at six per cent.

You will have to find a verdict in each of the cases. The forms of the verdict will be prepared and handed in time for you to fill them up in conformity to your findings.

111 I desire to modify the instruction regarding your finding, and now instruct you that in case you find the issue in the replevin suit for the defendant, you should at the same time find the value of the cattle taken by Teal & Co. from the defendant Bilby, and also the amount of the interest the defendant has in the cattle.

You are further instructed that if you find the issue in 409—the damage suit—for the defendant, you will merely say so in your verdict.

The court thereupon, in said charge, against plaintiff's objections, then and there charged the jury therein, as follows:

The cattle, as they arrived at Dawsonville, were unloaded, taken care of, and driven to the farm of Bilby, as testified to.

To which action of the court, as last aforesaid, in giving said charge so objected to, plaintiffs at the time objected, because it was assumed in said charge, as a matter of fact, as proven by the evidence, that said cattle were "taken care of" by defendant on their arrival at Dawsonville, when there was evidence in said cause tending to prove that said cattle were not taken care of at that time and place, but were suffered to remain there without food or water, and were then and there otherwise damaged by the want of proper care on the part of the defendant.

Which objections were by the court overruled, and the
112 jury charged as aforesaid; to which action of the court in so charging the jury as last aforesaid plaintiffs at the time then and there duly excepted, and still except.

The court thereupon, against the objections of plaintiffs, in said charge, then and there further charged the jury, as follows:

In this action (replevin) the question is, who is entitled to the possession of the cattle, the ownership not being disputed. The solution of this question depends on another, and that is, was there anything due to Bilby on account of feeding and care of the cattle and money charged to have been expended? If not, then plaintiffs, Teal & Co., are entitled to a verdict and such damages as they have sustained under the evidence by the detention of the cattle from them after the first day of December, 1881, and until they were delivered to them by the U. S. marshal.

To which action of the court, as last aforesaid, in so charging the jury said charge so objected to, plaintiffs objected at the time, on the ground that said charge authorized the jury to find, in said replevin suit, for the defendant, on account of feed and care of the cattle, and for the money charged to have been expended, without requiring the jury to deduct therefrom the damages which the evidence tended to prove plaintiffs had sustained by reason of defendant's
113 failure to feed and care for all of the fifteen hundred of said cattle under the contract in evidence. In case the jury should

find, from the evidence, that plaintiffs had sustained such damages, and because the jury were restricted from finding said damages for plaintiffs, and because said charge did not submit the issues between the parties in said action to the jury.

Which objections were by the court then and there overruled, and the jury so charged as last aforesaid; to which action of the court in so charging the jury plaintiffs at the time duly excepted, and still except.

The court thereupon, in said charge, further charged the jury against the objections of plaintiffs, as follows:

If, on the other hand, Bilby is entitled to pay for feed and care of the cattle, they must be returned to him, and he, Bilby, is entitled to the damages he has sustained in consequence of the cattle being taken out of his possession, namely, the trouble and expense of feeding and caring for them while at Dawsonville, as hereinafter further explained.

To which action of the court in giving to the jury said charge so objected to plaintiffs at the time objected, as last aforesaid, and for the further reason that the measure of damages for the taking of said cattle out of defendant's possession is incorrectly given to the jury in said charge last aforesaid.

114 Which objections were by the court overruled, and the jury so charged as last aforesaid; to which action of the court in so charging the jury as last aforesaid against plaintiffs' objections plaintiffs at the time duly excepted, and still except.

The court thereupon, in said charge, against plaintiffs' objections, further charged the jury, as follows:

The written contract provides that Bilby shall take the "cattle and winter them well on hay, straw, and stock-fields until grass comes; to be kept in enclosed pastures on good grass until the 15th of August, 1881, after which date on each and every day they shall be fed all the corn they will eat until delivered to J. Teal & Co." The provisions as to wintering them well on hay, straw, and stalk-fields will receive at your hands a reasonable construction. They are meant to convey the idea that the cattle should have a reasonable quantity of one or the other of the kind of food mentioned, so as to enable them to pass through the winter in reasonable good condition. Bilby was not thereby prohibited to feed them on grass, dry or green, or corn even, or partly substitute such food for the food named in the contract, so that the object, the keeping of the cattle in reasonably good order, was secured.

115 To which action of the court in so giving to the jury said charge so objected to plaintiffs at the time objected, for the reason that by the terms of the written contract between plaintiffs and defendants, and as the same were given by the court to the jury, defendant was bound to take these cattle and winter them well on hay, straw, and stalk-fields, and that plaintiffs were entitled to a strict and full compliance with the terms thereof. That the interpretation of said contract given and authorized by the jury in said charge is contrary to the terms of said contract and the law thereof, and that it was the duty of the court and not the jury to con-

struct the terms of said contract, and that said charge is erroneous, because it authorizes the jury to construct said contract and to find a compliance therewith on part of defendant, contrary to its terms and true intent and meaning.

Which objections were by the court overruled and the jury so charged as last aforesaid; to which action of the court in overruling said objections and in so charging the jury as last aforesaid plaintiffs at the time then and there duly excepted, and still except.

The court thereupon on said charge then and there further charged the jury against plaintiffs' objection, as follows:

It will not do to stick in the bark in expounding the contract, for if you did, what would become of these cattle? There are no
116 provisions in the contract for watering them yet. No one has contended that they were not to be watered. It belongs to the keeping and caring for them.

To which action of the court in then and there so giving to the jury said charge so objected to plaintiffs at the time objected, for the following reasons:

That the construction of said contract given in said charge and authorized by the jury is erroneous, and contrary to the terms and provisions of said contract; that plaintiffs are entitled to compliance with said contract according to its terms and provisions, and the jury are authorized to so expound said contract as to find a compliance therewith contrary to the terms thereof and from a violation of said contract; that by said charge the jury are authorized to expound the provisions of said contract, which it is the province of the court to construe and not of the jury, and that said charge is erroneous, misleading, and prejudicial to plaintiffs. Which objections were by the court overruled, and the jury so charged as last aforesaid.

To which action of the court in so overruling said objections and in so charging the jury plaintiffs at the time duly excepted, and still except.

The court then and there, in said charge, against plaintiffs' objections, further charged the jury, as follows:

117 The cattle are to be on good grass, in enclosed pastures. The object of the latter provision no doubt was to keep the cattle from running at large. It is for you to say whether the herding of a portion of them on open prairie a part of the time when such prairie is found to be fenced all around, except the road openings, and these guarded, is a compliance with the provisions of the contract.

To which action of the court in so giving to the jury said charge so objected to plaintiffs at the time objected, for the reason that the construction placed upon the provisions of said contract mentioned in said charge by the court is contrary to the terms, true intent and meaning thereof, and against the law, and that under said charge the jury are authorized to find a compliance with said provisions from a violation thereof by defendant.

Which objections were by the court overruled, and the jury so charged as last aforesaid; to which action of the court in over-

ruling said objections and in so charging the jury plaintiffs then and there duly excepted, and still except.

The court charged the jury then and there in said charge against plaintiffs' objections, as follows:

Bilby was bound to take reasonable care of the cattle with reference to the condition in which he took them. What is reasonable care, under the circumstances testified to, you are the judge of.
118 If he did not take such reasonable care, and any of the cattle died in consequence, he is responsible for them to plaintiffs. It was suggested in argument and shown that more or less of Bilby's own cattle were running with and taken care of the same as the Teal cattle. This testimony must be considered with reference to the condition of the cattle. Strong cattle may get along and do well with treatment under which weaker would suffer. The distinction here drawn has special application to the watering of some of the cattle.

To which action of the court in giving to the jury said charge so objected to plaintiffs at the time objected, for the reason that the contract read in evidence prescribed the manner in which the defendant was to take care of the cattle of plaintiffs; that the matter in controversy was whether he had complied with his contract, and was not a question of "reasonable care" on his behalf, and that the charge complained of authorized the jury to find such compliance on the part of the defendant from reasonable care of said cattle by defendant, and also to find what would be reasonable care under the evidence, thus submitting to the jury an issue not made by the pleadings and the evidence, and said charge is otherwise incompetent and erroneous, which objections were by the court overruled, and the jury so charged as last aforesaid. To which action of the court in overruling said objections and in giving to the
119 jury said charge so last objected to plaintiffs at the time duly excepted, and still except.

Thereupon the court in said charge further instructed the jury against plaintiffs' objections, as follows:

Bilby, under the written contract, was to preserve the hides of cattle which died and the ears of any which had ear-marks. Under this provision Bilby was bound to preserve all the hides of all the cattle which died, and unless he has done so he is bound to account for the whole of the 1,500 cattle, less such as he has preserved the hides of, or the preservation of them was agreed to be waived. There is testimony showing the number of hides preserved by Bilby and as to an agreement with plaintiff Coleman, waiving the preservation of some of them. If the whole of the steers which are claimed to have died have thus been accounted for to your satisfaction Biiby cannot be held responsible, provided they all died through unavoidable causes, and not through the neglect and carelessness of Bilby, as already instructed. The offer to count the hides claimed by Bilby to have been made to Coleman, if made as claimed, and the count actually made as testified to if satisfactorily proven, may be taken by you as showing that Bilby had the number of hides claimed. There are no provisions in the contract when the hides of cattle

which had died should be counted, and the reasonable con-
120 struction thereupon is that the hides preserved should be counted at a time and with a view of making the hides themselves available for use or sale.

To which action of the court in so giving to the jury said charge last objected to, plaintiffs' at the time then and there objected, for the reason that it was assumed in said charge, as a matter proven by the testimony, that the defendant had preserved the hides of a number of the cattle which had died, and that plaintiffs had waived the preservation of a number of said hides, and that this was a compliance with the terms of said contract stated in the said charge, where as there was evidence tending to prove the contrary, and the question of such preservation and waiver should have been left to the jury to find from the evidence; that the construction of said terms of said contract is erroneous in this, that thereby said hides should be preserved until the time limited by the contract for the return of the cattle as claimed by plaintiffs, as shown by the evidence, and said charge is otherwise erroneous.

Which objections were by the court then and there overruled, and the jury so charged as last aforesaid; to which action of the court in so giving to the jury the charge so objected to, plaintiffs then and there duly excepted and still except.

The court thereupon in said charge further charged the jury against plaintiffs' objections as follows:

121 A contract is claimed by Bilby to have been made changing some features of the existing written contract. Bilby affirms the change, Coleman denies it. An unimpeached witness is called by Bilby at the time of the claimed making of the change; to whom he, Bilby, repeats the agreement in the presence of Coleman, and the witness testifies to the change in court.

To which action of the court in then and there giving to the jury said charge last objected to, plaintiffs at the time then and there objected, for the reason that said charge assumed as facts proven by the evidence that defendant repeated the change of the contract to a witness, that said witness was impeached and testified to said change in court, when there was evidence in the cause tending to prove that no such change had ever been made, and that said issue should have been submitted to the jury, and the credibility of each and every witness and the weight and effect of the testimony of each testifying in that regard should have been left to the jury to determine on all the evidence in the case. Said charge is otherwise erroneous.

Which objections were, by the court, then and there overruled, and the jury so charged as last aforesaid; to which action of the court in overruling said objections, and each of them, and in so giving to the jury the charge so objected to, plaintiffs thereupon at the time duly excepted and still except.

122 The court thereupon in said charge further charged the jury against plaintiffs' objections as follows:

A man suing another must have a good cause of action. He cannot turn around and say that I have no cause of action; yet you are a rascal, and therefore I am entitled to recover a judgment, and take your property to satisfy it. What is intended by this allusion to the attempt to impeach is to direct your mind to the proper application of the testimony.

To which action of the court in so giving to the jury said charge last objected to, plaintiffs at the time objected, for the reason that there was no testimony in the case to which said charge, or any part thereof, was applicable, and the same was misleading and prejudicial to plaintiffs and their case, as made upon the evidence, and was not warranted by the evidence.

Which objections were by the court then and there refused, and the jury so charged as last aforesaid; to which action of the court in so giving to the jury said charge so objected to, plaintiffs thereupon at the time duly excepted and still except.

The court thereupon in said charge further charged the jury against plaintiffs' objection as follows:

Now, if you shall find from the testimony and under the instructions of the court that defendant, in caring for and feeding the cattle as he did, damaged them in value rather than increased it, you should find the issue in the first, the replevin, suit for the
123 plaintiffs and assess damages in their, plaintiffs', favor sufficient to cover losses incurred by being deprived of the possession of the cattle from the first day in December up to the time they (pl'ffs) obtained the possession of them under the writ of replevin.

But if, on the other hand, you shall find from the testimony, and under the instructions as given you by the court, that defendant Bilby was entitled to something for the care and feeding of the cattle as he did, after allowing and deducting therefrom any damages which plaintiffs may have sustained, in that case you are instructed to find the issue in the replevin case for the defendant and assess his damages in an amount sufficient to recompense him for his trouble, care, and cost of feeding and holding them at Dawsonville from the 2nd day of December up to the time they were taken out of his (def't's) possession by virtue of the replevin.

To which action of the court in so giving to the jury said charge so objected to, plaintiffs then and there objected for the reason that plaintiffs' right of recovery is erroneously stated; that the damages sustained by them, as shown by the evidence, is not correctly given; that the jury are restricted to finding damages in value to the cattle fed and cared for by defendant, and are not required to take into consideration the damages to plaintiffs from the loss, by
124 death or otherwise, of any of the said cattle lost or not delivered to plaintiffs through the failure of defendant to comply with his contract, or through his wrongful failure to make said cattle increase in weight to the extent of his said agreement; that defendant's right of recovery is erroneously given, and his measure of damages not correctly stated; the jury are authorized to find for

defendant, if they find he is entitled to anything for the care and feed of the cattle, without deducting the damages plaintiffs may have sustained by reason of the breaches of his contract as above stated, except such as plaintiffs may have sustained by reason of defendants damaging said cattle in value by caring for and feeding them. Said charge is otherwise erroneous and misleading.

Which objections were by the court overruled, and the jury charged as last aforesaid; to which action of the court in so giving to the jury said charge objected to, plaintiffs at the time duly excepted and still except.

The court thereupon in said charge further charged the jury against plaintiffs' objections as follows:

In the replevin suit you can only determine whether the plaintiffs or defendant is entitled to the possession of the cattle and the damages as stated. The determination of the amount of damages sustained by one or the other of the parties as to the treatment and care of the cattle is the subject-matter in controversy in the
125 second suit, the suit for damages on the contract.

To which action of the court in giving to the jury said charge so objected to, plaintiffs at the time objected, because the jury in determining the right of possession of the cattle replevined in the replevin suit were restricted from taking into consideration the damage sustained by plaintiffs by the failure of defendant to comply with their contract, under which he received the 1,500 cattle to feed and care for said cattle so received, and from the damage the plaintiffs may have shown by the evidence they had sustained by reason of the loss of any of said cattle or the wrongful acts of defendant, and that the said charge is otherwise erroneous and misleading.

Which objections were by the court overruled, and the jury so charged as aforesaid; to which action of the court in so giving to the jury said charge so objected to, plaintiffs at the time duly excepted and still except.

The court thereupon in said charge further charged the jury against plaintiffs' objections as follows:

Whatever value you fix on the cattle must be fixed with reference to the value of the cattle then, on the 1st day of December, 1881, at Dawsonville.

To which charge so objected to plaintiffs at the time objected, for the reason that there was testimony offered and in evidence tending to prove that there was no full market value for said cattle at
126 Dawsonville on December 1st, 1881, and that the nearest general market for said cattle was in Chicago, Ills., and that the jury should have been permited to determine from the evidence whether said cattle of the weight either as fixed by the contract or as actually shown by the cattle weighed could have found a market at Dawsonville on said 1st day of December, 1881, or have been sold there that day by plaintiffs without unreasonable loss. Which objections were by the court overruled, and the jury so charged as last aforesaid.

To which action of the court in overruling said objections, and in so charging the jury said charge so objected to, plaintiffs at the time duly excepted and still except.

The court thereupon in said charge further charged the jury against plaintiffs' objections as follows:

Under the written contract the plaintiffs are entitled to the hides of cattle which unavoidably died, unless you find that a tender of these was made by defendant to plaintiffs, in which latter case the defendant would not be liable for them. There is no proof before you as to the value of the hides, and as in order to recover their value the plaintiffs would have to show it, the hides seem to be out of the question, even if defendant's tender was valid. The foregoing is the claim of plaintiffs for damages, and they will be ascertained by you under the evidence and the instructions
127 of the court, as given you, in the manner stated, if the written contract has not been modified or changed.

To which charge so objected to plaintiffs at the time objected, for the reason that it was contrary to the evidence in the case, and that, irrespective of the value of the hides of the dead cattle, plaintiffs were entitled under their contract to have them preserved by defendant and tendered to them, to enable plaintiffs to ascertain the number of said cattle that had so died, and the causes of such death, and that said charge is otherwise erroneous and misleading.

Which objections were by the court overruled, and the jury so charged as last aforesaid; to which action of the court in so giving to the jury said charge so objected to, plaintiffs then and there duly excepted and still except.

The court thereupon in said charge further charged the jury against plaintiffs' objections as follows:

I desire to modify the instructions regarding your finding, and now instruct you that in case you find the issue in the replevin suit for the defendant, you should at the same time find the value of the cattle taken by Teal & Co. from the defendant Bilby, and also the amount of the interest the defendant had in the cattle.

Your are further instructed that if you find the issue in 409, the damage suit, for the defendant, your will merely say so in your verdict.

128 To which action of the court in so giving to the jury said charge so objected to, plaintiffs at the time objected, for the reason that the jury are not instructed as to what portion of the entire charge of said court is modified or changed or withdrawn from their consideration by the charge last given; because said charge is contradictory, erroneous, and misleading; because the jury are not instructed in the law as to their finding of the issue in favor of defendant, or in determining whether defendant has any interest in said cattle or the amount of said interest, and are not instructed in said charge as to what former parts of the entire charge of the court are to be regarded by the jury in their finding the issue in said suit, or in determining the value of the interest of defendant

in said cattle, or in determining whether defendant had any interest therein; and said charge so last objected to is otherwise erroneous, misleading, and prejudicial to plaintiffs.

Which objections were by the court then and there overruled, and the jury so charged as last aforesaid; to which action of the court in overruling said objections, and in so giving to the jury said charge so objected to, plaintiffs then and there duly excepted and still except.

129 Thereupon, and on the 2nd day of January, A. D. 1883, and at the said October term of said court, the jury returned the following verdict in open court, which verdict of the jury is in words and figures as follows, to wit:

"We, the jury, find the issues for the defendant, and assess the value of the property taken at 66,598.35 dollars, and assess the defendant's interest therein at $23,835.15.

"W. W. RIGGS, *Foreman.*"

And thereupon, on the 3rd day of January, 1883, the court rendered judgment in favor of said defendant according to said verdict; to which action of the court in rendering judgment on the verdict plaintiffs at the time duly excepted and still except.

And afterwards, on the 3rd day of January, A. D. 1883, and at said October term, 1882, of said court, and within four days after the rendition of said verdict, plaintiffs duly filed in said court their motion to set aside the verdict of the jury herein and for a new trial in said cause, which said motion is in words and figures as follows, to wit:

In the U. S. Circuit Court, Western Division of the Western Dist. of Mo.

JOSEPH TEAL & Co.
vs.
JOHN S. BILBY. } No. 409.

Plaintiffs move the court to set aside the verdict and for a new trial, because—

130 1. The court erred in refusing to admit competent and proper evidence offered by plaintiffs.

2. The court erred in refusing to exclude incompetent and irrelevant evidence on the part of defendant.

3. The verdict of the jury was against the evidence and the weight of the evidence.

4. The verdict is against the law of the case, and is excessive.

5. The court erred in charging the jury as to the law of the case.

6. Matters were submitted to and passed upon by the jury which were not presented by the pleadings.

7. Under the pleadings and evidence the verdict should have been for the plaintiffs.

L. H. WATERS & EDWARDS & RAMSEY, *P. A.*

And afterwards, at the same October term of said court, and on the 25th day of January, 1883, said motion in said cause was taken up by the court and argued by counsel for plaintiffs and defendant; and afterwards, to wit, at the same term, and on the 5th day of February, 1883, said motion for a new trial and to set aside the verdict of the jury in said cause were by the court overruled.

To which action of the court in overruling said motion and in refusing to set aside said verdict of the jury and to grant plaintiffs a new trial in said cause, plaintiffs at the time then and
131 there duly excepted and still except.

And inasmuch as the said several matters so produced and given in evidence for the defendant and by the plaintiff objected to, and plaintiffs' exceptions thereto made at the time and insisted upon, and the said several matters so produced and offered in evidence by plaintiffs and rejected by the court, and plaintiffs' exceptions thereto made at the time and insisted upon, and the several rulings of said court thereon, and the said instructions to the jury prayed for by plaintiffs and refused by the court against plaintiffs' objections and their exceptions thereto made at the time and insisted upon, and the said instructions to the jury given by the court against plaintiffs' objections and their said exceptions thereto made at the time and insisted upon, and the several other matters herein objected to and the plaintiffs' exceptions thereto made and insisted upon at the time, do not appear by the record of said cause or of said verdict, or the judgment herein, plaintiffs afterwards, to wit, on the — day of April, A D. 1883, and at and during said October term, 1882, of said court, upon leave and order of said court first had and obtained, and according to the statute in such case made and provided, duly presented in said court this their said bill of exceptions in said cause, and prayed said court to allow said bill of exceptions, and then and there to sign and seal the same,
132 and to make said bill of exceptions a part of the record in said cause, which on said last day aforesaid and at said October term, 1883, of said court was done accordingly.

A. KREKEL, [SEAL.]
Judge of said Court.

133 And afterwards, to wit, at said term, and on the 18th day of June, in the year aforesaid, the following further proceedings were had and entered of record in said cause, to wit:

JOSEPH TEAL *et al. against* JOHN S. BILBY.

This day come the plaintiffs, by their attorneys, Botsford & Williams, and present to the court a writ of error to reverse the judgment in the above-entitled cause, a citation to the defendant to appear at a Supreme Court of the United States on the second Monday of October next, and a bond in the sum of one hundred dollars, for the prosecution of said writ to effect, and to answer all damages and costs; and, thereupon, the premises having been considered,

the court doth allow said writ, and said citation is signed by the court, and said bond is approved and ordered to be made a part of the record, which is accordingly done.

And said bond is in words and figures as follows, to wit:

Know all men by these presents, that we, J. Teal & Co. and Henry Coleman, as principal and as sureties, are held and firmly bound unto John S. Bilby in the full and just sum of one hundred
134 dollars (100.00), to be paid to the said John S. Bilby, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 18th day of June, in the year of our Lord one thousand eight hundred and eighty-four

Whereas lately, at the October term, A. D. 1882, of the circuit court of the United States for the western district of Missouri, western division, in a suit depending in said court between Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs, copartners, trading and doing business under the firm name of J. Teal & Co., plaintiffs, and John S. Bilby, defendant, judgment was rendered against the said Joseph Teal, Henry Coleman, John Y. Todd, and Joseph S. Storrs, plaintiffs aforesaid, and the said Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs having obtained a writ of error of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John S. Bilby, citing and admonishing him to be and appear at a Supreme Court of the United States to be held at Washington city, D. C., on the second Monday of October next:

Now, the condition of the above obligation is such, that if the said Joseph Teal, Henry Coleman, John Y. Todd, and Joseph S. Storrs shall prosecute said writ to effect, and answer all damages and costs, if they fail to make good their plea, then the above
135 obligation to be void; else to remain in full force and virtue.

J. TEAL & CO. [SEAL.]
HENRY COLEMAN. [SEAL.]
A. A. WHIPPLE. [SEAL.]

Approved by—
A. KREKEL, *Judge.*

UNITED STATES OF AMERICA, *sct:*

I, Henry C. Geisberg, clerk of the circuit court of the United States in and for the western division of the western district of Missouri, do hereby certify, in obedience to the writ of error attached hereto, that the foregoing is a true and complete transcript of the record and proceedings, with all things concerning the same, in the case of Joseph Teal, Henry Coleman, John Y. Todd, and John S. Storrs, against John S. Bilby, as fully as the same remains on file and of record in my office.

Witness my hand as clerk and the seal of said court. Done at my

office in Kansas city, in said division and district, this 25th day of July, A. D. 1884.

[SEAL.]

H. C. GIESBURG, *Clerk*,
By WARREN STALSON,
Deputy Clerk.

Endorsed on cover: W. Missouri C. C U. S. No. 969. Joseph Teal, Henry Coleman, John Y. Todd, & John S. Storrs, partners, as J. Teal & Company, plaintiffs in error, *vs.* John S. Bilby. Filed 29 September, 1884.

123-5-42
123-5-42

Office Supreme Court U. S.
FILED.
JUL 9 1887
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

OCTOBER TERM A. D. 1887.—Nos. 51 and 52.

JOSEPH TEAL, HENRY COLEMAN, JOHN Y. TODD, AND JOHN S. STORRS, PARTNERS UNDER THE NAME OF J. TEAL & CO., PLAINTIFFS IN ERROR,

vs.

JOHN S. BILBY, DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the Western District of Missouri, Western Division.

Statement, Assignment of Errors, and Argument for Plaintiffs.

Statement.

These two actions at law were brought in the court below by plaintiffs in error, under their firm-name of J. Teal & Co., against defendant in error.

Case No. 51 was an action of replevin for the delivery of fifteen hundred head of cattle, of the value of seventy-five thousand dollars, the property of plaintiffs, in the possession of defendant.

Case No. 52 was an action for damages done to said cattle by defendant while the same were in his posses-

sion, brought by plaintiffs against defendant for breach of contract, by which defendant obtained possession of the cattle, and for loss of a part of the cattle while the same remained in his possession under such contract.

The two causes were tried by a jury, and an order was made of record (Rec., No. 52, p. 14) that they be consolidated for purposes of submission, and the hearing thereof then proceeded before the same jury, and they were tried at the same time and submitted on the same evidence and charge of the court.

In both cases the jury found the issues for defendant.

In the replevin case (51) the jury found the value of the property taken under the writ of replevin to be $66,598.35, and assessed defendant's interest therein at $23,835.12, (Rec., No. 51, p. 13,) and judgment was rendered thereon for the return of the property to defendant, or that defendant recover said sum of $23,835.12 of plaintiffs at his option.

On the verdict of the jury in the damage case—52—judgment was rendered against plaintiffs that they go hence without day and for costs. (Rec., p. 17.)

After motions for a new trial in each case were overruled, plaintiffs filed their separate bills of exception and sued out their separate writs of error to this court.

From the evidence preserved in the bills of exception, which are substantially the same in each case, it appears that plaintiffs introduced at the trial evidence tending to prove the following facts (Rec., 51, pp. 17–26; Rec., 52, pp. 21–30):

I.

That plaintiffs were the owners of three thousand and seven head of good graded American cattle, in good condition and fine health, from two to eight years old, in the county of Wasco, in the State of Oregon, and these cattle were, on the 10th and 14th days of June, 1880, driven by plaintiffs across the plains eastward to

a shipping point on the Union Pacific Railway, in Wyoming Territory, and they commenced arriving at and in the vicinity of Rock Creek station on that railway about the 3d day of October, 1880, in good condition, but thin in flesh. The cattle had been carefully handled during the drive, having good grass and water on the route, and there was a "drag band" of said herds, consisting of some two or three hundred of the lame and disabled cattle, when they arrived at the station. The cattle remained in the vicinity of Sheep Creek valley, near Rock Creek station, with plenty of water and fair grass, while there awaiting cars for shipment at Rock Creek station eastward over such railway, and as soon as practicable after the arrival of the cattle they were shipped to Council Bluffs, Iowa, on such railway, between the 14th day of October and the 10th day of November, 1880. The first shipment was made October 14th, 1880, of three hundred and seventy-nine of the cattle from Rock Creek station to Council Bluffs over the Union Pacific Railway, a distance of about seven hundred miles, and they arrived at Council Bluffs on the 17th day of October, 1880. This first shipment from the Teal & Co. herd averaged with the balance of the herd in age, weight, health, and condition at the time of shipment, and they were in good healthy condition, but thin in flesh. They were shipped unloaded from the cars, fed, watered, and rested from twelve to twenty-four hours at North Platte City, on the Platte river, on the route from Rock Creek station to Council Bluffs, as were all the other shipments of the herd made from the same point to Council Bluffs, and that all of the cattle were carefully handled on the route.

After the first shipment of these cattle had been received at the stock-yards at Council Bluffs, on the 17th day of October, they were seen and examined by defendant Bilby at that place, and he expressed himself satisfied with them; and thereupon negotiations were entered into between Joseph Teal, a son of one of plaintiffs, and defendant, for defendant to feed fifteen hundred of these cattle, the first shipment to be a sample lot of what was to follow; and to save dispute, Mr. A. V. Bass, of the firm of Rosenbaum, Bass & Co., stock commission merchants of Council Bluffs and agents for

plaintiffs in the handling of these cattle, was made judge of the cattle.

At the time and before the final execution of the contract, defendant knew and was informed by plaintiffs of the manner in which the cattle had been handled on the trip from Oregon to Council Bluffs, and what they had passed through at and in the vicinity of Rock Creek station while there awaiting shipment, and the treatment they had received before and during their shipment. After this, on the 3d day of November, 1880, at Council Bluffs, plaintiffs and defendant entered into a written contract as follows:

"This contract, entered on this day, November 3d, 1880, by and between J. Teal & Co., of Portland, Multnomah county, Oregon, of the first part, and John S. Bilby, of Fairview, Nodaway county, Missouri, of the second part, is as follows:

"J. Teal & Co. to weigh fifteen hundred (1,500) cattle at the Transfer Stock Yards, Council Bluffs, Iowa; after feeding, watering, and then shrinking twelve hours, to be delivered to John S. Bilby at Dawsonville, Missouri; said cattle to be fed, watered, weighed, and handled by Rosenbaum, Bass & Co., Transfer Stock Yards, Council Bluffs, Iowa. The cattle to be delivered to John S. Bilby shall be the same that J. Teal & Co. drove this year from Wasco county, Oregon, to Rock Creek, Wyoming Territory, branded with "T" on the left side, similar in age, flesh, and quality to a train-load that arrived at Council Bluffs, Iowa, on Sunday, October 17th, 1880. Mr. Bass, of the firm of Rosenbaum, Bass & Co., to be the judge of the cattle arriving, whether or not they are an average lot with the train-load which arrived on Sunday, October 17th, 1880. If any train of cattle shall arrive prior to twelve o'clock M., they shall be taken off feed and water the same evening of the day of arrival at seven o'clock P. M.; if they shall arrive after twelve o'clock M., they shall be shut off feed and water at seven o'clock P. M. of the following day.

"Said John S. Bilby agrees to take these cattle and winter them well on hay, straw, and stock fields until grass comes. To be kept in enclosed pastures on good grass until the 15th day of August, 1881; after which date, on each and every day, they shall be fed all the

corn they will eat until delivered to J. Teal & Co. John S. Bilby agrees to deliver the same cattle at Dawsonville, Missouri, after weighing them at the nearest scales to any feed lot, where each bunch of cattle may feed after a twelve hours shrink, between seven o'clock in the evening and seven in the morning. In case J. Teal & Co. shall not take the entire bunch as fed in any one yard, they shall come and make selections of such cattle as they wish to cut out from two to five days prior to the day of weighing. Said cattle to be weighed and delivered in lots from one hundred and seventy-five (175) to two hundred and twenty-five (225) between the 15th day of October, 1881, and the 1st day of December, 1881, by giving ten days' notice either by telegraph, letter, or in person at the option of J. Teal & Co.; J. Teal & Co. agreeing to pay five cents per pound for all increase of weights from time of weighing to Bilby to time of reweighing back to J. Teal & Co.; they further agreeing to advance one thousand (1,000) dollars to John S. Bilby on the first day of September, 1881, to be applied to payment of weights added to the cattle on last delivery, John S. Bilby to be responsible for all cattle lost, strayed, or stolen, or from any dying through the neglect or carelessness of the said John S. Bilby. Any dying through causes which are unavoidable shall be shared thus: J. Teal & Co. to bear the loss of the steer and John S. Bilby the feed. If any steers die, John S. Bilby shall preserve the hide as evidence of death, and the ear if there are any ear marks.

"It is further agreed that if the said John S. Bilby shall pay the freight on said cattle from Council Bluffs to Dawsonville, Missouri, he shall be allowed ten per cent. interest on said sum, and the amount to be paid on the delivery of cattle to said J. Teal & Co. The said John S. Bilby agrees that if said cattle remain in his possession until December 1st, 1881, that he shall so feed and care for them that [they] will increase in weight four hundred and fifty (450) pounds each on an average." (Rec., 51, p. 19; Rec., 52, p. 23.)

At the time of the execution of this contract all the cattle received by defendant under it were at Council Bluffs, were seen and examined by defendant, and he expressed himself to plaintiffs and to Mr. A. V. Bass,

who had been selected to judge the cattle, as well satisfied and pleased with them.

At the time of the signing of the contract defendant, at plaintiffs' request, and in order to obtain their assent and signatures thereto, executed to plaintiffs a bill of sale of the cattle to be delivered to defendant, whereby defendant bargained, sold, and conveyed said cattle to plaintiffs to have and to hold to themselves and to their assigns, and covenanted and agreed with plaintiffs to warrant and defend the sale of said cattle unto plaintiffs against all persons.

The cattle mentioned in the contract were received at the stock yards in Council Bluffs, on the 1st, 2d, and 3d days of November, 1880; defendant was present at the time; the cattle were placed in the stock yards, well fed and watered while remaining there, and were in age, quantity, and condition equal to the sample train-load mentioned in the contract; about thirteen hundred of these cattle were seen and examined by Mr. A. V. Bass, as they arrived, and were judged by him to be an average lot with the train-load of October 17th, 1880, as to age and grade, but were thinner in flesh; of these cattle there were weighed at Counsel Bluffs by Bass, to defendant, under the contract, on the 4th, 5th, and 6th of November, 1880, fifteen hundred head, averaging nine hundred and fifty pounds in weight, and all were taken off feed and water, and shrunk before weighing as required by the contract. After weighing, the cattle were on the same days shipped by railway to defendant at Dawsonville, Missouri, a distance of eighty miles; the freight was paid by defendant: the "drag band" of plaintiff's cattle did not arrive at Council Bluffs until November 12th, 1880, and none of them were included in the cattle delivered to defendant; these fifteen hundred head of cattle arrived at Dawsonville, were unloaded after arrival, and crowded by defendant into insufficient stock-pens and lanes, and remained without food or water until driven away the next day after their arrival, when they were divided into two herds, about eleven hundred of them in one herd and four hundred in the other. The first herd of about eleven hundred cattle was driven by defendant, the next day after arrival at Dawsonville, without food

or water, to an open prairie, a distance of one and a half miles from Dawsonville, and placed on an unenclosed piece of ground, which had been grazed down by neighboring cattle, and were permitted to remain there without food or water for two days and nights; were then driven south, kept on an open prairie without food or water that night, and then driven to a large pasture and stock field on the Nodaway river; that the remaining four hundred were unloaded at Dawsonville, and kept in the stock-pens and lane without food or water thirty-six hours, while they were branded by John Wishard, for defendant, and then driven west and placed in grass pasture. From the time of their arrival at Dawsonville each of said herds was kept by defendant upon insufficient food, and were not well wintered upon hay, straw, and stock fields; the cattle suffered from want of food and water during winter and early spring of 1880 and 1881, and were in a starving condition. In the month of April, 1881, they were placed on unenclosed prairie range on insufficient grass, and permitted to remain without sufficient food and water until about the month of June, 1881, when the prairies were enclosed by defendant; and in the summer of 1881 they were held in enclosures which did not furnish sufficient grazing or water for the cattle; the cattle were not fed all the corn they could eat during the fall and winter of 1881; defendant placed the cattle on corn about the 15th day of August, 1881, and fed them partly green corn and stalks and partly musty old corn until corn matured that year; the cattle were not full fed during the months of August and September, October and November, 1881, by defendant, on corn; from want of sufficient hay, straw, and stock pasture, and from want of water in the winter of 1880 and 1881, and from want of proper care and attention to the cattle while in his possession, one hundred and fifty of them died; others were drowned in the Nodaway river, while attempting to get water, through the neglect of defendant, and at the springs in defendant's fields, where they mired in the mud; and that others died from overeating in adjoining fields, into which they had broken in search of food, and others of said cattle were lost by the neglect of defendant; so that at the time for the delivery of the

cattle to plaintiffs, defendant did not have, and plaintiffs only received, under the writ of replevin from defendant, twelve hundred and twenty-nine of the cattle.

Plaintiffs paid defendant on the 1st day of September, 1881, one thousand dollars in cash, in accordance with the terms of the contract, and afterward, and before the 1st day of December, 1881, duly notified defendant that they would be ready to receive and demand the delivery of the fifteen hundred head of cattle, according to the terms of the contract, at Dawsonville, Missouri, on the 1st day of December, 1881; and in pursuance of this notice, on the first and second days of December, defendant weighed twelve hundred and forty (1240) of the cattle; the total weight showed the average to be 1276 pounds per head, and that after they were weighed, they were driven to Dawsonville on the 2d and 3d days of December, 1881; plaintiffs were present there ready to receive the cattle under the terms of the contract, and after the cattle had arrived, again made demand of defendant for fifteen hundred head of cattle, and notified defendant that they were ready to settle according to the contract, and demanded, according to its terms, the production of the hides of such as had died; but defendant refused to deliver any of the cattle to plaintiffs until he had been paid for the number of pounds put on them by his care and feed, and claimed that he had preserved the hides of such as had died, and had notified plaintiffs thereof; the cattle remained at Dawsonville, in defendant's possession, until the 7th day of December, 1881, and while in his possession were kept on insufficient food and water, and on the day last named, the United States marshal, under the writ of replevin, took from the possession of defendant twelve hundred and twenty-nine of the cattle and delivered them into the possession of plaintiffs at Dawsonville, Missouri, from which place they were immediately placed on cars and sent to Chicago in the State of Illinois.

At the time the cattle were driven by defendant to Dawsonville, on the 2d and 3d days of December, 1881, they were thin in flesh, were not good fat cattle for beef, and were not worth as much as cattle similar in quality and condition, but weighing fourteen hundred

pounds, by one dollar and fifty cents per hundred pounds. The cattle were injured by reason of want of proper care and sufficient food and water from the time they were brought to Dawsonville, on the 2d and 3d days of December, 1881, after being weighed, until they were taken by the United States marshal, fifty cents per hundred pounds on each head.

After the cattle had been taken by the marshal, said twelve hundred and twenty-nine head of cattle were well cared for, fed and watered by plaintiffs until they were transferred on cars to Chicago. There was no market for the sale of such a large lot of cattle as those taken by the marshal at Dawsonville, Missouri, at the time the cattle remained there in the month of December, 1881, so that the cattle could be sold for their full value, or that such cattle could be sold or disposed of at Dawsonville at the time, except by dividing the herd and selecting the different grades for shipment as beef cattle and for feeding cattle therefrom, and selling and disposing of the same in such lots and grades.

Plaintiffs then offered to prove by depositions, that the cattle were received at Chicago on or about the 12th day of December, 1881, and were sold on the market at the full market value of said cattle at the time, at from three and one-half to four cents per pound, and the total amount received by plaintiffs at Chicago for said cattle was $54,123.29, which was their full market value at that time and place, and that Chicago was the nearest general market for said cattle to the town of Dawsonville; which deposition and all testimony offered by plaintiffs to prove such facts, or either of them, were by the court excluded from the jury, and plaintiffs duly excepted thereto. (Rec. 51, p. 26; Rec. 52, p. 30.)

Plaintiffs then offered to prove by depositions, that the cattle were not in a good condition for beef cattle, but were too thin in flesh; that cattle of like quality weighing fourteen hundred pounds were worth more in the markets of Chicago during the month of December, 1881, than the cattle of plaintiffs in the condition they were as to weight at the time, of two dollars and fifty cents per hundred pounds; but such depositions and all testimony of such facts were by the court ex-

cluded from the jury, to which plaintiffs at the time duly excepted.

Plaintiffs then introduced evidence tending to prove, that on the 1st and 2d days of December, 1881, at Dawsonville, Missouri, the fifteen hundred head of cattle, if they had been increased in weight four hundred and fifty pounds each, so as to weigh on an average fourteen hundred pounds, would have been worth five and one-fourth cents per pound, and that the twelve hundred and twenty-nine head of cattle taken by the marshal were not worth as much at that time and place by one dollar and fifty cents per hundred pounds as if the same cattle had weighed fourteen hundred pounds per head, but that there was no market for such cattle at Dawsonville at that time, so that said cattle could be sold or otherwise disposed of, excepting by dividing the same into lots and grades for shipment for beef cattle and as feeders.

Defendant then offered evidence (Rec. 51, p. 26, *et seq.*; Rec. 52, p. 41, *et seq.*) tending to prove that the cattle of plaintiffs arrived at Rock Creek station early in October, 1880, very poor in flesh, and that they were held in open range near such station, with little grass and no water except alkali water, which was injurious to them, and they were exposed to snow storms and freezing weather while in that vicinity; that the first shipment of cattle from plaintiffs' herd, which was made on the 14th day of October, 1880, were of stronger and better cattle and in better health and condition than those shipped afterwards; that of the cattle that remained after the first shipment, a portion had been held in the storms; that some of these cattle died on the range, and that the cattle, at the time of the shipment from Rock Creek station, were poor and weak; that the alkali water was damaging to them, and would have the effect of scouring them and make them weak and sick, and caused the hair to come off after they had been delivered to defendant. The cattle had not been carefully handled while at Rock Creek station, and were injured thereby; that the cattle delivered to defendant had not been properly handled in the transportation thereof on cars from Rock Creek to Council Bluffs, and that many of the shipments, from which the

fifteen hundred had been taken, died on the cars, or in the pens at Council Bluffs, from weakness on account of want of food and water and from exposure and want of careful handling; that immediately after the cattle arrived at Council Bluffs they were given all they could eat and all the water they could drink and were not shrunk before weighing to defendant, as provided by the contract, and that the cattle weighed more by reason thereof by twenty-five to fifty pounds than they otherwise would have weighed if they had been taken off feed and water, as provided by the contract, and that this was unknown to defendant and to said Bass; that defendant did not examine the cattle on their arrival at Council Bluffs until after they were weighed, and that he had no personal knowledge of the manner in which they had been treated after arrival at Rock Creek station, and was not informed thereof at the time.

That A. V. Bass, mentioned in the contract as the judge of the cattle as to age, flesh, and quality, did not look after the matter of the selection or weight of said cattle except thirteen hundred head, although he knew of the weighing of the other two hundred for the defendant, and that Bass did not know at that time anything about how the cattle delivered to the defendant had been treated between the 13th day of October and the 1st day of November, 1880, at and in the vicinity of Rock Creek station; that Bass was a member of the firm which was receiving a commission from plaintiffs for the cattle delivered to defendant under the contract, which fact was unknown to defendant at the time he received the cattle; that thirteen hundred head of the cattle were taken by defendant to Dawsonville on the cars November 4th, 1880, and were in no better condition when shipped than when they arrived at Council Bluffs; that defendant paid the freight from Council Bluffs, Iowa, to Dawsonville, on November 4th and November 7th, 1880, amounting to $1,169.50; that some of the cattle were at the time of shipment in a weak and unfit condition to ship, and one died on such shipment; that an agent of plaintiffs accompanied them from Council Bluffs to Dawsonville for the purpose of delivering the same to defendant and of ascertaining the fields of defendant and his facilities for keeping the

cattle; that defendant was the owner of large bodies of land, and had an abundance of pasturage, hay, straw and stalk fields and corn, and the land was well supplied with water; that the agent of plaintiffs, who accompanied the first thirteen hundred cattle, was present at Dawsonville, and superintended their unloading and delivery to the defendant; that the cattle were properly handled by defendant while at Dawsonville, and were driven to defendant's farm, about eight miles distant, having on the drive an abundance of food and water; that thereafter, and up to the time of the delivery of the cattle at Dawsonville, in December, 1881, the cattle had been in charge of careful and experienced feeders, being kept all the time in pastures and feed pens and fed in accordance with the terms of the written contract, and as the same was modified in December, 1880; that part of the cattle delivered to defendant were not a part of the herd to which the sample lot of October 1st, 1880, belonged, and this was unknown to defendant at the time of delivery.

That at the time of the delivery of the cattle to the defendant they were in a feverish condition, and immediately after such delivery they were put on good grass pastures for a few days and had access to hay, straw, and stock fields; that five to ten died on the drive to Dawsonville to these pastures, and within thirty days thereafter twenty-five to thirty more died from weakness and exhaustion; the cattle did not improve upon the feed they were receiving; these cattle were a mixed lot, partly taken from another herd and the *tailings* of the herd of plaintiffs, and the sample lot of October 17th (1880) were picked of younger and stronger cattle; that the appearance of the cattle delivered to the defendant would not disclose their treatment nor show they were diseased, but that it would require time to develop the evil effects of such treatment; that early in the month of December, 1880, upon an examination of the cattle, it was considered by plaintiff, Coleman, who was present with the cattle, and by defendant, that the cattle could not be wintered on hay, straw, and stock fields, and it was a few days thereafter finally agreed upon between Coleman and defendant that defendant should let the cattle into corn, and whatever time they went into corn

that winter should be deducted from the corn feed next year at the end of the next grain feeding, and that defendant should be released from the stipulation of the written contract requiring him to increase the average weight of the cattle from four hundred and fifty pounds; that from the time of the modification of this contract, in December, 1880, to September 1st, 1881, Coleman was present on defendant's farm, had full knowledge of the manner and the treatment of these cattle by defendant, and made no complaint of the same; that after said written contract was modified defendant placed the cattle in the stock field and corn fields, and that they were fed, except for a few days, from that time forth through and during the winter of 1880 and 1881, all the corn and feed that they would eat, but that many of the cattle were in such weak and exhausted condition from previous bad treatment before they came into defendant's possession, that two hundred and sixty-eight of them died while in his possession, and those that survived did not thrive upon this food; that the cattle were fed about seventy-five days during the winter of 1880 and 1881 on corn and stock fields, were placed in good enclosed grass pastures in the spring of 1881, after grass came, with plenty of water, except that a part of them were placed on the prairie, where there was good grass and fenced all around except the road opening, and these were guarded until August 15th, 1881, when the cattle were fed all the corn they would eat until November 1st, 1881; that on the 1st day of November, 1881, plaintiffs paid defendant one thousand dollars for feeding the cattle, and on the 28th of October, 1881, defendant notified plaintiffs that the cattle were ready for delivery on the 31st day of October, 1881, under said contract as modified; and in pursuance of said notice, he weighed the cattle, amounting to 1243 head, and they weighed one million five hundred and fifty thousand three hundred and five (1,550,305) pounds, and plaintiffs were not present to receive the cattle. Thereupon they were turned into stock pasture fields and full fed by defendants until December 1st, 1881, on corn to the value of $9,420; on November 15th, 1881, defendant received written notice from plaintiffs demanding the fifteen hundred cattle under the written contract of November

3d, 1880, to be weighed and delivered at Dawsonville, December 1st, 1881. In pursuance of such notice defendant commenced to weigh twelve hundred and forty head of said cattle on the 1st and 2d days of December, 1881, and said cattle weighed at that time and place one million five hundred and eighty-four thousand one hundred and sixty-four (1,584,164) pounds; that plaintiffs disturbed the cattle by building a fire near the pens where they were held on the nights of November 30th and December 1st, 1881, just prior to the day when they were to be weighed, and by reason of such disturbance the weight of said cattle at the time they were weighed on said 1st and 2d days of December, 1881, was reduced twenty-five to fifty pounds per head.

The cattle were shrunk by defendant before weighing according to the terms of the written contract, and after the same were weighed defendant offered to deliver them over to plaintiff on payment in cash by plaintiff of five cents per pound for all extra weight over and above nine hundred and fifty pounds per head according to the weights November 1st, 1881, and on payments for the care and feed of same from that time to December 1st, 1881, and for freight advanced on the cattle, which payments plaintiff refused to make, and demanded the cattle to the number of fifteen hundred head. The market value of the cattle at Dawsonville on the 1st day of December, 1881, was three and one-half to four cents per pound, and the difference in value between the cattle at Dawsonville, Missouri, on said 1st day of December, 1881, and the same cattle weighing 1,400 pounds, would not exceed fifty cents per hundred pounds. There was a market for cattle at Dawsonville at that time, and the value of beef cattle at that place was the Chicago market price for the same kind of cattle, less freight and the ordinary shrinkage of such cattle between these places occasioned by shipment, and that in the summer of 1881 there was a large demand there for such cattle as those replevied by the plaintiffs from the defendant, for the reason that with the exception of a few of the cattle they were in fine condition to be taken and fed for fatted beef cattle, and that the cattle would have brought more at Dawsonville than they were afterwards sold for at Chicago;

that after the plaintiff obtained the cattle under the writ of replevin they were carelessly handled, and were not sold by plaintiffs in Chicago to their best advantage; that plaintiffs' fifteen hundred cattle, when delivered to defendant at Dawsonville in November, 1880, were of the value of $26,400; at the time the twelve hundred and thirty-two head were taken from defendant by the marshal December 1st, 1881, were of the value of $62,832. Of these cattle delivered to defendant by plaintiffs thirteen hundred head weighed 1,250,390 pounds, an average of 950 pounds per head, and two hundred head of them weighed 174,650, an average of 837 pounds and a fraction; that defendant lost none of the cattle, and none strayed or were stolen.

Plaintiffs, in rebuttal, offered evidence (Rec., 51, p. 36 *et seq.;* Rec., 52, p. 40) tending to prove that their cattle while in the vicinity of Rock Creek station, Wyoming, in October, 1880, were carefully handled and did not suffer, and were not injured by the use of water of the spring. The water was of good quality and used by all the stockmen for the western cattle brought over the trail and resting there, and had been so used for years without injury to them. The water was wholesome; that of the three thousand and seven head of plaintiff's Oregon trail cattle, including the "drag band," there were shipped from Rock Creek to Council Bluffs, arrived there, and sold or otherwise disposed of by plaintiffs, two thousand nine hundred and ninety-one head, including fifteen hundred head delivered to defendant; and the average weight of all of said cattle was 944 pounds per head, and all of the cattle that died on such shipment to Council Bluffs, or were down in the cars, were in the last shipment of the "drag band," except four or five; that no change of the written contract of November 3d, 1880, was made by plaintiffs, and defendant had made statements and admissions from time to time after said alleged change of contract tending to prove the written contract was still in force according to its terms, and that plaintiffs and defendant operated and acted under such written contract.

Of the two hundred and sixty of said cattle which defendant claimed had died, twenty-six were sold by

defendant, and that others of them were lost or unaccounted for.

The cattle were not injured or damaged in any way by the fire which plaintiffs caused to be built near the pens where the cattle were held on the night of November 30th and December 1st, 1881, and that they did not shrink any in weight from that cause. The general reputation of defendant for truth and veracity, honesty, and fair dealing in the neighborhood in which he resided was bad, and that defendant was not to be believed under oath in a case where he had any pecuniary interest, and defendant was a dishonest man and a rascal. Defendant had not offered or tendered to plaintiffs the hides of the dead cattle or any of them, and that plaintiffs had not waived the same.

Defendant then offered evidence tending to prove that his reputation for truth and veracity and fair dealing in the neighborhood where he lived, and also where he was known, was good, and that the witness so testifying would believe him under oath in a matter in which he had a pecuniary interest, and that defendant was an honest man and not a rascal.

This is all there is material of the evidence introduced or offered, that it is necessary to state, and it is set out here somewhat at length, as the exceptions relied on are directed mostly at the charges or instructions of the court as being unauthorized by the facts of the cases.

Assignment of Errors.

For errors it is here assigned—

I.

The court refused to charge the jury as requested in plaintiffs' first instruction, viz.:

"1. If Mr. Bass, the referee named in the contract which has been read in evidence, determined that the cattle delivered to and received by Bilby were, as to age, flesh, and quality, such as Bilby was to have under said contract, then Bilby is bound by that determination,

unless it has been shown by the evidence that Bass, in passing upon the age, flesh, and quality of said cattle, was influenced by representations made by plaintiffs as to their age, flesh, and quality, and that such representations were false." (Rec., 51, p. 37 *et seq.*; Rec., 52, p. 41 *et seq.*, for instructions asked, &c.)

II.

The court refused to charge the jury as requested in plaintiffs' second instruction, viz.:

"2. That although the jury may believe from the evidence that the cattle received by the defendant were in fact thinner in flesh than the lot which had arrived at Council Bluffs October 17, 1880, yet if their condition as to flesh was known to defendant at the time he received them, and that, notwithstanding their condition as to flesh, he received them under said contract, it is too late now to complain."

III.

The court refused to charge the jury as requested in plaintiffs' ninth instruction, viz.:

"9. It was the duty of the defendant, under the written contract in evidence, if the same was not altered, to preserve the hides of all cattle which died while the cattle were in the custody of the defendant under said contract, until December 1st, 1881, and also the ear marks of all such dying as had ear marks. The hides and ears, if thus preserved, would, however, be evidence of the death of such cattle only, and not of the cause or manner of their death, nor would they show that any such cattle died from causes unavoidable on the part of the defendant.

"But if the jury believe from the evidence that said hides were not preserved by defendant for exhibition to plaintiffs December 1st, 1881, and that such preservation and exhibition was not waived by any of the plaintiffs, then the burden is on the defendant to show to the satisfaction of the jury by a preponderance of evidence both how many of said cattle died and that their

deaths resulted from causes unavoidable on the part of defendant, and for all dying which are not accounted for defendant is responsible to plaintiffs."

IV.

The court refused to charge the jury as requested by plaintiffs in their thirteenth instruction, viz.:

"13. The defendant in case No. 409 (52 now) in his answer set up an oral agreement made and entered into by and between himself and the plaintiffs, on or about the 15th day of December, 1880, by which defendant claims that the written contract dated November 3d, 1880, read in evidence, was modified in this, that in consideration of the bad condition of the cattle the time they were received by defendant under said written contract, and by reason of the bad treatment and injury done to them before they were received by defendant, it was agreed that defendant should, in the winter of 1880 and 1881, feed corn to said cattle, and that the time during which he should so feed them corn should be deducted from the latter part of the time they were to be kept on full feed of corn under said written contract, and that defendant was to be discharged from his obligation under his written contract to increase their weight four hundred and fifty pounds each, on an average, if they were left in his custody until December 1st, 1881.

"The court instructs the jury that before they can believe in the existence of such new oral contract all its terms and conditions must be clearly established by a preponderance of evidence on the part of defendant. Such oral contract must also be founded upon some new and sufficient consideration, and if the jury believe from the evidence that the defendant after he first received said cattle failed to feed them on hay, straw, and stalk-fields as much as they could eat, as he bound himself to do by said written contract, and otherwise failed to treat them with ordinary care and prudence, whereby the necessity to feed them corn was brought about by his own wrongful acts, or if he fed them corn merely to supply the deficiency of the hay, straw, or stalks

which he was to feed them, or if he fed them corn of his own volition, for any purpose, and without any express agreement between him and any of the plaintiffs to feed them corn with a view to change the manner or time of feeding them as fixed by said written contract, then, in either of these cases, the fact that defendant fed said cattle corn at different times during the winter of 1880 and 1881 would not afford a sufficient consideration for the alteration of said written contract, nor discharge defendant from his obligation to feed them corn as stipulated therein."

V.

The court refused to charge the jury as requested by plaintiffs in their fourteenth instruction, viz.:

"14. The jury are the sole judges of the weight of the evidence and of the credibility of the witnesses, and may give to the testimony of every witness such weight as they deem it entitled to, and if they believe that any witness has willfully testified falsely to any material fact in controversy on the trial of this case, they are at liberty to disregard the whole of the testimony of such witness."

VI.

The court charged the jury as matter of fact that—

"The cattle as they arrived at Dawsonville were unloaded, taken care of, and driven to the farm of Bilby, as testified to." (Rec., 51, p. 44.)

VII.

The court charged the jury against objection of plaintiffs as follows:

"It may have been unfortunate on the part of Bilby to have agreed to an arbitrator who was in the interest of Teal, by way of commission in the cattle on which he was to pass; yet that was for Bilby to determine, and he cannot complain of the acts of Bass, if honestly discharged by him. It is only in case Bass was himself deceived by plaintiffs, in not putting him, Bass, in full

possession of the knowledge possessed by them, and necessary for proper discharge of his, Bass', duties as arbitrator, that you can go behind Bass' acts. Then, if the cattle of the Teal herd were infected by a disease incurred through careless handling, want of sufficient or proper food or water, and such disease could not be discovered by a careful examination, which Bass is presumed to have made, in such a case the plaintiffs were bound, if they knew of such disease, to disclose it to Bass or Bilby, and their failure to do so was a fraud upon Bilby; and if damages have resulted to him, Bilby, in consequence, he is entitled to recover them in this action." (Rec., 51, p. 48.)

VIII.

The court charged the jury against objection of plaintiffs as follows:

"Bilby, under the written contract, was to preserve the hides of the cattle which died, and the ears of any which had ear-marks. Under this provision Bilby was bound to preserve the hides of all the cattle which died; and unless he has done so, he is bound to account for the whole of the 1,500 cattle, less such as he has preserved the hides of, or the preservation of them was agreed to be waived.

There is testimony showing the number of hides preserved by Bilby, and as to an agreement with plaintiff Coleman waiving the preserving of some of them. If the whole of the steers which are claimed to have died have thus been accounted for to your satisfaction, Bilby cannot be held responsible, provided they all died through unavoidable causes, and not through the neglect or carelessness of Bilby, as already instructed. The offer to count the hides, claimed by Bilby to have been made to Coleman, if made as claimed, and the count actually made as testified to, if satisfactorily proven, may be taken by you as showing that Bilby had the number of hides claimed. There are no provisions in the contract where the hides of cattle which had died should be counted, and the reasonable construction thereupon is that the hides preserved should be counted at the time,

and with a view of making the hides themselves available for use or sale.

"Under the written contract the plaintiffs are entitled to the hides of cattle which unavoidably died, unless you find that a tender of these was made by defendant to plaintiffs, in which latter case the defendant would not be liable for them. There is no proof before you as to the value of the hides, and as, in order to recover their value the plaintiffs would have to show it, the hides seem to be out of the question, even if defendant's tender was invalid." (Rec. 51, pp. 50, 61.)

IX.

The court charged the jury against plaintiffs' objection as follows:

"A contract is claimed by Bilby to have been made changing some features of the existing written contract. Bilby affirms the change; Coleman denies it. An unimpeached witness is called by Bilby at the time of the claimed making of the change; to whom he, Bilby, repeats the agreement in the presence of Coleman, and the witness testifies to the change in court." (Rec. 51, p. 51.)

X.

The court charged the jury against plaintiffs' objection as follows:

"A man suing another must have a good cause of action. He cannot turn around and say that I have no cause of action; yet you are a rascal, and, therefore, I am entitled to recover a judgment and take your property to satisfy it. What is intended by this allusion to the attempt to impeach is to direct your mind to the proper application of the testimony." (Rec. 51, *Ib.*)

XI.

The court charged the jury against plaintiffs' objection, as follows:

"In this action (replevin) the question is, who is entitled to the possession of the cattle, the ownership not

being disputed. The solution of this question depends on another, and that is, was there anything due to Bilby on account of feeding and care of the cattle and money charged to have been expended? If not, then plaintiffs, Teal & Co., are entitled to a verdict and such damages as they have sustained under the evidence by the detention of the cattle from them after the first day of December, 1881, and until they were delivered to them by the U. S. marshal.

"It will not do to stick in the bark in expounding the contract, for if you did, what would become of these cattle? There are no provisions in the contract for watering them; yet no one has contended that they were not to be watered. It belongs to the keeping and caring for them." (Rec. 51, p. 54–56.)

XII.

The court charged the jury against plaintiffs' objection, as follows:

"The written contract provides that Bilby shall take the 'cattle and winter them well on hay, straw, and stock-fields until grass comes; to be kept in enclosed pastures on good grass until the 15th of August, 1881, after which date on each and every day they shall be fed all the corn they will eat until delivered to J. Teal & Co.' The provisions as to wintering them well on hay, straw, and stalk-fields will receive at your hands a reasonable construction. They are meant to convey the idea that the cattle should have a reasonable quantity of one or the other of the kind of food mentioned, so as to enable them to pass through the winter in reasonably good condition. Bilby was not thereby prohibited to feed them on grass, dry or green, or corn even, or partly substitute such food for the food named in the contract, so that the object, the keeping of the cattle in reasonably good order, was secured." (Rec. 51, p. 55.)

XIII.

The court charged the jury against plaintiffs' objection as follows:

"Bilby was bound to take reasonable care of the cattle

with reference to the condition in which he took them. What is reasonable care under the circumstances testified to, you are the judge of. If he did not take such reasonable care, and any of the cattle died in consequence, he is responsible for them to the plaintiffs." (Rec. 51, p. 57.)

XIV.

The court charged the jury against plaintiffs' objection as follows:

"Now, if you shall find from the testimony and under the instructions of the court that defendant, in caring for and feeding the cattle as he did, damaged them in value rather than increased it, you should find the issue in the first (the replevin) suit for the plaintiffs and assess damages in their (plaintiffs') favor sufficient to cover losses incurred by being deprived of the possession of the cattle from the first day in December up to the time they (pl'ffs) obtained the possession of them under the writ of replevin.

"But if, on the other hand, you shall find from the testimony, and under the instructions as given you by the court, that defendant Bilby was entitled to something for the care and feeding of the cattle as he did, after allowing and deducting therefrom any damages which plaintiffs may have sustained, in that case you are instructed to find the issue in the replevin case for the defendant and assess his damages in an amount sufficient to recompense him for his trouble, care, and cost of feeding and holding them at Dawsonville from the 2d day of December up to the time they were taken out of his (def't's) possession by virtue of the replevin." (Rec. 51, p. 59.)

XV.

The court charged the jury against plaintiffs' objection as follows:

"In the replevin suit you can only determine whether the plaintiffs or defendant is entitled to the possession of the cattle and the damage as stated. The determination of the amount of damages sustained by one or the

other of the parties as to the treatment and care of the cattle, is the subject-matter in controversy in the second suit—the suit for damages on the contract." (Rec. 51, p. 60.)

XVI.

The court charged the jury against plaintiffs' objection as follows:

"I desire to modify the instructions regarding your finding, and now instruct you that in case you find the issue in the replevin suit for the defendant, you should at the same time find the value of the cattle taken by Teal & Co. from the defendant Bilby, and also the amount of the interest the defendant had in the cattle.

"You are further instructed that if you find the issue in 409 [52 now], the damage suit, for the defendant, you will merely say so in your verdict." (Rec., 51, p. 61.)

XVII.

The court refused to allow plaintiffs to read the deposition of Wood as to the sale of cattle at Chicago in December, 1881. (See *supra*, p. 9, and Rec., 51, p. 26.)

Argument.

I.

The court erred in refusing to charge the jury as requested in plaintiffs' first instruction. (See *supra*, p. 16, for this instruction.)

By the terms of the written contract between plaintiffs and defendant, under which the cattle of plaintiffs were delivered to defendant, A. V. Bass, of the firm of Rosenbaum, Bass & Co., stock commission merchants at the Transfer Stock Yards, Council Bluffs, Iowa, was to be the judge of the cattle arriving, whether or not they were an average lot with the train-load which arrived Sunday, October 17th, 1880." He was made

judge of the cattle in order to save all dispute between the parties as to whether the cattle were similar in age, flesh, and quality with the sample train-load; and in the absence of fraud or collusion with plaintiffs, or intentional misconduct on his part, his determination was conclusive, unless his action in passing the cattle as an average lot was induced by fraudulent representations made by plaintiffs as to their age, quality, or condition.

Martinsburg and Potomac R. R. Co. *v.* March, 114 U. S., 549–554.
Sweeny *v.* United States, 109 U. S., 618–620.
Killburg *v.* United States, 97 U. S., 403.
Noffsinger *v.* Ring, 71 Mo., 216.
Board of Education *v.* Shaw, 15 Kan., 33.

There was no evidence in the case showing, or tending to show, that Bass was guilty of any misconduct or fraud, or that he was in collusion with, or in any way influenced by, any representations made by the plaintiffs in passing upon and judging the cattle delivered to defendant to be an average lot in age, quality, flesh, and condition with the sample train-load of October 17th, 1880. There was no evidence tending to show that plaintiffs in any manner attempted to influence his decision. There was evidence on the part of plaintiffs tending to show that the fifteen hundred cattle passed upon by Bass, and delivered to defendant under the contract, on the 4th, 5th, and 6th days of November, 1880, were, at that time, in age, quality, and consideration, and having the same brand, as the sample train-load mentioned in the contract, but thinner in flesh, and that said cattle averaged nine hundred and fifty pounds per head. On behalf of defendant, evidence was given tending to show that the cattle received by him had been injured by the manner in which they had been handled, and by reason of exposure to storms and from

want of sufficient food and good water, and from drinking water from alkali springs while at Rock Creek station, Wyoming Territory, and vicinity, awaiting cars for shipment to Council Bluffs, Iowa, and were in a weak and debilitated condition; but that the appearance of the cattle when delivered to defendant would not disclose the treatment they had previously received, and that it required time to develop the evil effects of such treatment; that although the cattle might appear to be very thin and weak, yet it would not be apparent that they were diseased. On the contrary, experienced cattlemen might well suppose that they would, upon the treatment provided for in the contract, soon recover their flesh and strength; that after defendant received the cattle, a large number (268) died from said injuries and exposure. There was no evidence in the case, on the part of either plaintiffs or defendant, tending to show that plaintiffs had any knowledge that the cattle passed upon by Bass and delivered to defendant were in any manner injured by reason of the treatment they had received, if any, before being passed upon and judged by Bass, or that the water of the "Seven Miles Springs and Soda Lakes," near Rock Creek station, used in watering the cattle while there, was injurious to the health of the cattle. On the contrary, plaintiffs introduced evidence tending to show that the cattle had been carefully handled while at and in the vicinity of Rock Creek station, and did not suffer from and were not injured by the use of said alkali water, or from want of sufficient food; that the water was good and wholesome, and used by all stockmen for their cattle, bringing western cattle on the trail and resting them there, and had been so used for years without injury to the cattle. Under these circumstances in evidence, plaintiffs were entitled to have the jury instructed as

prayed for by them on this branch of the case. The court refused the instruction, and in lieu thereof charged the jury—(see *supra*, p. 19, and Rec., 51, p. 48; and Rec., 52, p. 53; see seventh assignment of errors herein.)

This charge of the court is erroneous because it assumes that *the cattle were carelessly handled by plaintiffs and did not have sufficient food or water*, and leaves the jury to find from these assumed facts that the cattle were diseased at the time they were passed upon and judged by Bass. The manner in which these cattle had been handled and fed and watered before they arrived at Council Bluffs, and were passed upon by Bass, was a matter of controversy between the parties, upon which evidence for both sides was introduced before the jury; and it was a matter for the jury, and not for the court, to determine from the testimony whether or not the cattle had been carelessly handled or did not have sufficient or proper food or water before they were judged by Bass to be an average lot with the sample train-load. The charge in this regard is also clearly erroneous, because it assumes and virtually tells the jury that there was evidence that plaintiffs knew of the diseased condition of the cattle as claimed by defendant, when there was no testimony in the case tending to show that plaintiffs had any knowledge that the cattle at that time had a hidden or secret disease.

"It is clearly error," says Chief Justice Taney, "in a court to charge a jury upon a supposed or conjectural state of facts of which no evidence has been offered. The instruction presupposes there was some evidence before the jury which they may think sufficient to establish the facts hypothetically assumed in the opinion of the court; and if there is no evidence which they have a right to consider, then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead them. It may induce them

to indulge in conjectures instead of weighing the testimony."

United States *v.* Breitling, 20 How., 252.

"When a prayer for instruction is presented to the court, and there is no evidence in the case to support the theory of fact which it assumes, the prayer should be denied; and if given by the court it is error, as the tendency of such instruction is to mislead the jury by withdrawing their attention from the legitimate points of the testimony."

Michigan Bank *v.* Eldred, 9 Wall., 544–554.

In strong condemnation of this practice see also—

R. R. Co. *v.* Horst, 93 U. S., 299.

Meguire *v.* Corwine, 101 *Ib.*, 111.

II.

The court erred in refusing to charge the jury as requested in plaintiffs' second instruction. (See *supra*, p. 17.)

The evidence on part of plaintiffs tended to show, that the cattle weighed to defendant under the contract were an average lot with the train-load of October 17th, 1880, as to age and grade, but somewhat thinner in flesh, and that they weighed on an average 950 pounds per head; that defendant was present at the weighing of the cattle, and assisted in weighing them, and expressed himself satisfied with them; that he had seen and examined the first train-load of cattle arriving at Council Bluffs, October 17th, 1880, after their arrival at that place, to which train-load the cattle to be weighed and delivered to defendant were to be similar in age, flesh, and quality. The evidence on part of defendant tended to show that, at the time defendant received the cattle, he supposed they were an average lot in age, flesh, and quality to the portion of plaintiffs' herd which had arrived at Council Bluffs on the 17th day of October, 1880, but

that the cattle of the sample lot weighed on an average 1001 pounds per head; and that thirteen hundred of the cattle received by defendant under his contract weighed on an average 950 pounds, and the remaining two hundred weighed on an average 837 pounds per head; and that he did not examine the cattle until they were weighed.

This evidence as to the difference in the weight and flesh of the cattle weighed to defendant with the sample train-load, and of defendant's examination and knowledge of their condition as to flesh of both shipments, and of his receipt of the cattle in this condition of flesh without objection, would certainly authorize the court to give the instruction prayed for. But the court ignored it entirely in the charge to the jury, and left them uninstructed on this part of the case, to consider the evidence of such difference before them, without any rule of law for their guidance in determining what effect should be given to the same in arriving at their verdict.

It is a fundamental rule, that if an instruction asked for by a party embodies a correct statement of the rules of law applicable to the facts in evidence, and its omission leaves the jury without any rule for their guidance, in case they find the facts as stated, such omission is error.

Whitney *v.* Shuburn, 12 Allen (Mass.), 111.

And the court is bound to instruct the jury on a point of law relevant to the issue, if requested.

Douglass *v.* McAllister, 3 Cranch, 298.

Smith *v.* Carrington, 4 *Ib.*, 62.

III.

The court erred in refusing to charge the jury as requested by plaintiffs in their ninth instruction. (See *supra*, p. 17, for this instruction.)

By the terms of the written contract in evidence defendant was to "preserve the hides if any of the steers should die, *as evidence of death*, and the ears if there are any ear-marks." The object and purpose of this provision of the contract was, as stated therein, "to preserve the hides as evidence of death." And as the cattle were to remain, under the last clause of the contract, with defendant until December 1st, 1881, and plaintiffs were to pay defendant five cents per pound for the increase in the average weight of four hundred and fifty pounds each when said cattle were delivered to plaintiffs, it is evident that the hides of such cattle as should die, and the ears if there were any ear-marks, should be preserved until the period arrived for the complete performance of the provisions of the contract by the delivery of the cattle on the 1st day of December, 1881, at Dawsonville, Missouri, when they were to be produced as evidence of the death of the cattle not then and there delivered.

It was therefore defendant's duty under the contract to preserve the hides of the cattle that died while they were in his possession until December 1st, 1881, and exhibit them to plaintiffs on that day at Dawsonville, Missouri, as evidence of the death of the cattle that had died up to that date, unless such preservation and exhibition had been waived by plaintiffs, and the instruction should have been given. The evidence in the case on part of defendant failed to show any such compliance on his part with the contract or waiver of its requirements.

From the bill of exceptions preserved in the case, it appears that defendant introduced evidence tending to prove that in March, 1881, plaintiff Coleman agreed to count and receive the hides defendant had taken off the cattle that had died prior to that time, and that defendant got the hides together for that purpose, but he, Coleman, afterward refused and neglected to do so; that defendant had two hundred and fifty-one hides on his

farm ready for counting, inspection, and receiving by plaintiffs; that in April, 1881, defendant tendered these hides to Coleman and requested him to count, inspect, and receive them, which he refused to do; and that during the summer of 1881 these hides rotted and became spoiled without any fault on part of the plaintiff.

Plaintiffs, in rebuttal, introduced testimony tending to prove that defendant had not offered or tendered to plaintiffs the hides of the dead cattle, or any of them, and that the tender or offer of said hides had not been waived by plaintiffs.

The charge of the court on this branch of the case (see *supra*, p. 20, for this instruction) utterly ignores the purpose plainly expressed in the contract, for which the hides were to be preserved as evidence of death; tells the jury that the reasonable construction of this provision of the contract is that the hides should be counted at a time and with a view of making them available for use and sale; misstates the testimony as to a counting of the hides as being actually made; treats the alleged offer to count and tender made in April, 1881, as absolving defendant from all liability for his failure to preserve the hides; and finally tells the jury that as there is no proof of the value of the hides they are out of the case, even if defendant's tender was invalid.

The elimination from the case by the court of this provision in the contract, by which plaintiffs sought to protect themselves against loss from defendant's failure to properly account for all their cattle committed to his care, by requiring him to preserve the hides of such as died as evidence of their death, and the virtual withdrawal from the jury of all evidence relating to the preservation and exhibition to plaintiffs of the hides of the dead cattle, so that they could know, as they were entitled to know, that all their cattle had been accounted

for by defendant, was calculated to mislead the jury from the consideration of one of the main and important issues before them, to prejudice the jury against plaintiffs' claim for damages resulting from the loss of the dead cattle, and must have contributed to induce the jury to render their extraordinary verdicts in these cases, and is clearly erroneous under the rule laid down in *Ranney* v. *Barlow*, 112 U. S., 207, and cases cited, p. 215.

IV.

The court erred in refusing to charge the jury as requested by plaintiffs in their thirteenth instruction. (See *supra*, p. 18, for this instruction.)

The written contract between plaintiffs and defendant not having been complied with by defendant, the law requires that any change or modification or abrogation of its terms by another agreement, by parol only, between the parties, to be valid and binding, must be founded on a new and sufficient consideration.

Thurston *v.* Ludwig, 6 Ohio St., 1.
Carter *v.* Smith, 43 Vt., 577.
Pratt *v.* Morrow, 45 Mo., 407.
Henning *v.* Ins. Co., 47 Mo., 431.
Cummings *v.* Arnold, 3 Met. (Mass.), 486.

And to render the waiver of performance of the terms of the contract effectual, it must have occurred before the contract was broken by defendant.

Cumber *v.* Wane, 1 Smith Lead. Cas., 633, and cases cited.
Wharton *v.* Missouri Car Co., 1 Mo. App., 577, and cases cited.

This is the doctrine as laid down in *Gross* v. *Lord Nugent*, 5 B. & A., 65, by Lord Denman, and has since

been followed in England and in this country—*Emerson* v. *Slater*, 22 How., 28.

The evidence in the case on the part of plaintiffs tended to show that defendant, after he had first received the cattle, and before the alleged change in the agreement, neglected to care for and feed them in the manner agreed upon in the written contract, and that large numbers of them had died from such neglect. The evidence on the part of defendant tended to show that he properly cared for and fed the cattle, but that they did not thrive or improve upon the food, and that many of them died by reason of the diseased condition of the cattle, occasioned by the treatment they had received before they came into his possession; that upon an examination of the cattle it was considered by plaintiff Coleman and defendant that the cattle could not be wintered on hay, straw, and stalk fields, and it was a few days thereafter finally agreed upon between Coleman and defendant that defendant should let the cattle into corn, and whatever time that they went into corn that winter should be deducted off the corn feed next year at the end of the next grain feeding, and that defendant should also be released from the stipulation of the written contract requiring him to increase the average weight of the cattle four hundred and fifty pounds; that thereafter, during the winter of 1880 and 1881, the cattle were placed on corn and stalk fields, and defendant fed the cattle on corn until the spring of 1881.

The evidence on part of plaintiffs in regard to any change in the written agreement as claimed by defendant, directly contradicted the evidence on the same point on behalf of defendant.

Whether the bad condition of the cattle, at the time of the alleged oral agreement, necessitating a change in their food and treatment, was the result of the breach

of his obligations by defendant to winter them well on hay, straw, and stalk fields until grass came, or whether he fed them corn because his hay, straw, and stalk fields were exhausted, as shown by the evidence on the part of plaintiffs, was material and necessary to be considered by the jury in finding whether any change had been made in the contract releasing defendant from his duty under the contract to winter the cattle well on hay, straw, and fields, and to so feed and care for the cattle that they should, at the time of delivery back to plaintiff, weigh on an average fourteen hundred and fifty pounds, and also in finding whether there was any consideration proven for the alleged new agreement; and these matters should have been placed before the jury by appropriate constructions as prayed for by plaintiffs. On the contrary, the court in its charge failed to call the attention of the jury to any of the matters stated, or to require them to find there was any consideration for the alleged abrogation of the written contract, and the substitution of a new and oral agreement therefor as claimed by defendant. The charge of the court on this branch of the case is as follows:

"In attempting to arrive at a satisfactory conclusion regarding the modification of the written contract, a natural inquiry is, Was there a reason and necessity for the change? The parties alike interested in the preserving of the cattle were upon the ground. The cattle were dying in large numbers from some cause. Would a change of food suggest itself to meet the contingencies? If so, there would be a reasonable motive for the change. A contract is claimed by Bilby to have been made changing some features of the existing written contract. Coleman denies it. An unimpeached witness is called by Bilby at the time of the claimed making of the change to whom he (Bilby) repeats the agreement in the presence of Coleman, and the witness testifies to the change in court. A number of the witnesses testify that the cattle were put on corn about the

time of the claimed change. The rest of the testimony bearing on the question consists of acts and admissions claimed as made by the parties to the modification, and is for and against the change. From the testimony pertaining to it, you must determine, first, whether there was any change, and if you find that a change was made, what that change was. If you find that there was no modification or change, then the written contract remained in force."

Under this charge, it became utterly immaterial whether the defendant complied with or violated his agreement to winter the cattle well on hay, straw, and stalk fields, and whether the cattle were dying from his own neglect in properly taking care of them; and all the evidence introduced by plaintiffs to show these facts, and that the change in the feeding of the cattle had been brought about by the wrongful acts of defendant himself, was of no value in aiding the jury to arrive at the sole question presented by the charge. Was there a change in the written contract; and if so, what was the change? The charge is also erroneous and prejudicial, in that it assumes to pass upon the weight of the testimony and the credibility of the witnesses, and assumes as a fact shown by the evidence that the alleged change or agreement was repeated by defendant to an unimpeached witness, in the presence of Coleman, and that the witness testified to the change in court when the evidence was conflicting on this alleged fact, and it should have been left to the jury to determine the weight and effect of the testimony and the credibility of the witness.

V.

The court erred in refusing the fourteenth instruction as prayed for by plaintiffs. (See *supra*, p. 19, for this instruction.)

The evidence in the case on the part of plaintiffs was directly and irreconcilably conflicting with the evidence on the part of defendant in error, and concerning almost every material fact, the witnesses, including the parties to the suit, flatly contradicted each other in their sworn testimony.

The condition of the cattle before and at the time of delivery to defendant in November, 1880, their treatment while in his hands and under his control, the causes which produced the great mortality among them, after plaintiffs in error had parted with their possession, the pretended change and abrogation of the written contract by which their rights and obligations were fixed and determined, and the acts, conduct and declarations of the parties after such alleged change in the written contract, and the character of defendant for truth and honesty,—were all, and each of them, the subject of an amount of contradictory testimony on the part of the various persons sworn as witnesses in the case that was wonderful indeed.

If there ever was a case in a court of justice where it was not only peculiarly appropriate, but absolutely necessary, for the protection of the rights of the parties and the due administration of the law, that the jury should have been instructed as to their province and duty in passing upon the weight of the testimony and the credibility of the witnesses, this was one. The instruction did not, therefore, assert a mere abstract proposition of law, but was warranted by the state of the evidence in the case, and should have been given to the jury.

State *v.* Dwire, 25 Mo., 553.

"The facts in evidence that will warrant this instruction," says Judge Richardson, delivering the opinion of the court in this case, "are not necessarily such as even create a suspicion in the mind of the judge that

the witness has knowingly sworn falsely to any material matter, for it may often happen that his evidence will be received with perfect confidence in its truth, while that of his assailants will be disregarded. But when a witness is contradicted in a material fact, it is for the jury to pass on his credibility; and the party against whom the evidence is given is entitled to the declaration of law from the court contained in the refused instruction. Other witnesses implicated the defendant, but this court cannot tell how, for the verdict was influenced by the testimony of this witness; and though the jury may believe that he had not been successfully contradicted, the judgment must be reversed because the defendants were denied the benefit of an established rule of evidence to be declared in the form of an instruction, and which they were entitled to for whatever it was practically worth.

"In my opinion, if the jury believe that a witness has wilfully testified falsely in respect to any material fact, it is their *duty* to disregard the whole of his testimony, and they should be so instructed by the court."

In Gillett *v.* Wimer, (23 Mo., 76), where a similar instruction was refused, Ryland, J., after citing the opinion of Mr. Justice Story in the Santissima Trinidad, (7 Wheat., 283), for the court, says:

"We think that in order to enable the jury to understand their rights and privileges, and to do justice to the parties, whenever the testimony calls for such an instruction the court ought to give it. The jury are to weigh the evidence, the manner of detailing it by the witnesses, and to give it such credence as in their opinion it deserves. We do not say that it would be error for the court below to refuse to instruct a jury in such cases to reject the testimony of the witness entirely. Such an instruction had better never be given; but it is the duty of the court to let the jury weigh the evidence and to advise or instruct them that they are authorized to reject or to believe such portions of it as in their minds accord with the truth. It is for the jury to believe or disbelieve—the court cannot tell them how much.

"In this case, there being a contradiction of the only witness for plaintiff, and that too in a matter material to the merits of the controversy between the parties, the court ought to have given the instruction asked for by the defendant."

The cases are reviewed in Paulette *v.* Brown, (40 Mo., 52), and the same doctrine stated and affirmed, and it may be regarded "as declaratory of principles of evidence well established."

Brown *v.* Hannibal & St. Joe Railroad Co., 66 Mo., 588–600.

Not only did the court refuse this instruction prayed for by plaintiffs in error, in regard to the jury being the sole judges of the credibility of the witnesses, and that they were at liberty to disregard the testimony of any witness who had willfully sworn falsely to any material fact, but in its charge to the jury the court assumed to pass on the credibility of the sole witness for defendant on the most important and material matter in the whole controversy; that is, the alleged modification of the written contract. In that portion of the charge already quoted, the court tells the jury:

"A contract is claimed by Bilby to have been made changing some features of the existing written contract. Bilby affirms the change; Coleman denies it. *An unimpeached witness is called by Bilby at the time of the claimed making of the change, to whom he, Bilby, repeats the agreement in the presence of Coleman, and the witness testifies to the change in court.*"

To this portion of the charge plaintiffs objected at the time for the reasons stated in the bill of exceptions, that said charge assumed as facts proven by the evidence that defendant repeated the change of contract to a witness; that said witness was unimpeached, and had testified to the change in court, when there was evidence tending

to show that no such change had ever been made, and that said issue should have been submitted to the jury, and the credibility of each and every witness and the weight and effect of the testimony of each testifying in that regard, should have been left to the jury to determine from all the evidence in the case. (*Bank* v. *Hunt*, 11 Wall., 391, and cases cited, p. 395.)

The credibility of a witness is in all such cases solely for the jury to determine. The law decides upon the competency of witnesses, and the jury upon their credibility. Whether the witness was impeached or unimpeached, was a question of fact for the jury to determine, and not for the court; and it was a palpable violation of the right of plaintiffs in error to have the credit of the witness passed upon by the jury, for the court to determine it for itself, and to refuse to submit this question to the jury for their determination.

After instructing the jury that the witness is unimpeached, the court proceeds to tell them that this "unimpeached witness is called by Bilby at the time of the claimed making of the change in the written contract, to whom he (Bilby) repeats the agreement in the presence of Coleman, and that the witness testifies to the change in court." Each of these statements, assumed by the court in the charge to be true, as matters of fact, were, except the fact that the witness so testified in court, disputed and denied by plaintiffs in error, and there was testimony before the jury tending to show that they were false.

These facts, therefore, should have been submitted to the jury in such a form as to authorize them to draw their own conclusions as to the truth or falsity of the statements of the witness, and the charge, as given, had the effect to withdraw one of the most important and disputed questions of fact in the case entirely from their consideration.

It has ever been the doctrine of the courts of the United States, as it has been the doctrine of the common law, that it belongs to the jury to determine matters of fact.

Georgia v. *Brailsford*, 3 Dall., 1.
McLanahan *v.* Insurance Co., 1 Pet., 170–183.
Van Ness *v.* Pacard, 2 Pet., 137.
Chesapeake & Ohio Canal Co. *v.* Knapp, 9 Pet., 54.

The court cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have.

Greenleaf *v.* Birth, 9 Pet., 299.
Phœnix Co. *v.* Doster, 106 U. S., 30.

In this connection it is proper to refer to that portion of the charge of the court excepted to by plaintiffs regarding the impeachment of defendant as a witness. After conceding the right of plaintiffs in error to show that defendant could not be believed under oath, and also to show that he was dishonest, the court say:

"A man suing another must have a good cause of action. He cannot turn around and say that I have no cause of action, yet you are a rascal, and therefore I am entitled to receive a judgment and take your property to satisfy it. What is intended by this allusion of the attempt to impeach is to direct your minds to the proper application of the testimony."

There was no testimony in any part of the case to which this language of the charge was applicable, and it was calculated to prejudice the jury against the case made by plaintiffs. They had made the honest attempt to impeach defendant's credibility as a witness, and for this purpose had introduced evidence as to his general moral character showing him to be unworthy of belief, a dishonest man, and a rascal. This they were permitted

to do by the court without objection, and it was competent testimony for purposes of impeachment, as has been settled in Missouri for many years.

State *v.* Shields, 13 Mo., 236.
State *v.* Breeden, 58 Mo., 507.
State *v.* Miller, 71 Mo., 590.

This testimony having gone to the jury without objection, and with the sanction of the judge as to its competency for the purposes for which it was offered, plaintiffs were entitled to have it considered under appropriate instructions by the jury in passing upon the credibility of defendant as a witness; and this attack coming from the judge presiding at the trial, in his charge against plaintiffs for making this character of proof, and against their causes of action on trial for the recovery of their living cattle, and for damages for those that died through defendant's neglect to care for them, as he had agreed to do, was not warranted by anything in the case as shown by the record, and was well calculated to improperly influence the jury against plaintiffs and their causes of action, and was equivalent to the judge saying to the jury that plaintiffs came into court without any case, and were trying to recover a judgment against defendant because his character was bad and he was a rascal. In the mildest form to put it, this was misleading the jury upon a gratuitous statement by the court, and is error.

Jones v. *Randolph*, 104 U. S., 108.
R. R. Co. v. *Houston*, 95 *Ib.*, 697.

VI.

The court erred in charging the jury as a matter of fact that "the cattle, as they arrived at Dawsonville, were unloaded, taken care of, and driven to the farm of Bilby, as testified to."

The testimony in the case on part of plaintiffs was that the cattle were not "taken care of" by defendant after being unloaded at Dawsonville on their arrival at that place, but were crowded into insufficient stock pens and lanes, and permitted to remain there without food or water until driven away by defendant. The cattle were divided into two herds, one of which, consisting of about eleven hundred head, was driven by defendant and his employees to an open prairie and placed on an unenclosed piece of ground which had been grazed down by neighboring cattle, and were permitted to remain there without food or water for two days and nights, when they were driven south, kept on an open prairie without food and water that night, and then driven to a large pasture and stock field on Nodaway river; that the remaining four hundred were unloaded at Dawsonville and kept in the stock pens and lanes without food or water for thirty-six hours while they were branded, and then driven west and placed in grass pastures.

The disputed question of fact whether defendant took care of the cattle on their arrival at Dawsonville or neglected to do so, whereby they were injured, should have been left to the jury. (Manchester *v.* Erricsson, 105 U. S., 347.) This being one of the facts at issue, the jury should have passed upon it, and not the court. *United States* v. *Tillotson*, 12 Wheat., 180; *Hickman* v. *Jones*, 9 Wall., 197.

VII.

The court erred in charging—(see *supra*, p. 21, for this instruction.)

Under this charge the jury were authorized to find for defendant in the replevin suit, if there was anything due defendant for the care and feeding of the cattle involved in that suit, without regard to the damages which plaintiffs may have sustained by reason of defendant's

failure to feed and care for all the cattle received by him under the contract, and the jury were restricted from finding any such damages, in reduction or extinguishment of defendant's claim. Defendant's right to possession of the cattle involved in the replevin suit depended upon the question whether he was entitled to a lien upon them under the contract for feeding and caring for the fifteen hundred cattle received by him under such contract; and the damages which plaintiffs may have sustained by reason of defendant's failure to care for all the cattle received under the contract would go to the reduction and extinguishment of defendant's lien.

Babb *v.* Talcott, 47 Mo., 343.
Railroad *v.* Smith, 21 Wall., 255.

VIII.

The court erred in charging the jury that—(see *supra*, p. 22, for this instruction.)

By the terms of the written contract defendant was bound to take these cattle and "*winter them well on hay, straw, and stalk-fields until grass comes,*" and plaintiffs were entitled to a full compliance by defendant with the contract according to its terms. Defendant, in the care and feed of the cattle, was bound to exercise the care and diligence required of him by his contract. The contract was the law of the case.

Goodfellow, Ex'r, *v.* Meegan, 32 Mo., 283.

The charge of the court, that the provision referred to is to receive "a reasonable construction at their hands," and that defendant could substitute other food and care than that required by the contract for the cattle of plaintiffs, provided the cattle were kept in "reasonably good order" thereby, authorized the jury to disregard the express terms of the contract, to find a

compliance with the contract contrary to its express provisions, and to so construe the contract between the parties as to make a new contract between them, substituting "reasonable quantity," "reasonable good condition," and "reasonable good order," for the fixed and definite terms of the written agreement.

The charge should not therefore have been given, as it was calculated to mislead the jury and was prejudicial to plaintiffs.

Sturgeon *v.* Hock, 43 Iowa, 155.

The charge was also erroneous, in submitting to the jury the construction of these terms of the written contract as to wintering the cattle well on hay, straw, and stalk-fields.

The contract being in writing, it was the province and duty of the court to construe it and to inform the jury of its meaning. The construction of the written contract was a question of law for the court, and not one of fact for the jury.

Levy *v.* Gadsby, 3 Cranch, 180.
Goddard *v.* Foster, 17 Wall., 142.
State, to use, &c., *v.* Le Faivre, 53 Mo., 470.
Edwards *v.* Smith, 63 Mo., 119.
Rohrabacker *v.* Ware, 37 Iowa, 85.

IX.

The court erred in charging the jury, that "the cattle are to be kept on good grass in enclosed pasture. The object of the latter provision, no doubt, was to keep the cattle from running at large. It is for you to say whether the herding of a portion of them on open prairie a part of the time, when such prairie is found to be fenced all around, except the road openings, is a compliance with the provisions of the contract."

The cattle were, by the terms of the contract, to be

kept in "*enclosed pastures on good grass*," and the object of this provision was, not to prevent them from running at large, but to secure good grass for the cattle in enclosed pastures from the time the cattle were taken off the hay, straw, and stalk fields, until they were to be fed corn in August, 1881; and plaintiff was entitled to have the cattle kept in enclosed pastures on good grass, and not herded on the open prairie where the grass had been eaten down by other cattle.

The charge also assumes, as a matter of fact, that the cattle were kept by defendant a portion of the time on the open prairie, which was fenced all around except the road openings, when the evidence on part of plaintiff showed that they were placed in the month of April, 1881, on an unenclosed prairie range, and permitted to remain there without sufficient food or water until June, 1881, when said prairie range was enclosed by defendant; and the action of defendant in so suffering the cattle to remain on such oper prairie range should not have been submitted to the jury as a compliance with defendant's obligation to keep the cattle in enclosed pasture on good grass, without requiring the jury to find that such open prairie range furnished good grass for pasturage of the cattle.

X.

The court erred in charging the jury, that "Bilby was bound to take reasonable care of the cattle with reference to the condition in which he took them. What is reasonable care under the circumstances testified to, you are the judge of. If he did not take such reasonable care, and any of the cattle died in consequence, he is responsible for them to plaintiff."

The effect of this portion of the charge was to relieve defendant from the obligation to comply with his contract—to take the cattle and winter them well on

hay, straw, and stalk fields until grass came; to keep them in enclosed pastures on good grass until August 15th, 1881, and to feed them all the corn they could eat each and every day thereafter until delivered to plaintiff; and to limit his liability to taking "reasonable care of the cattle with reference to the condition in which he took them."

There was no issue of reasonable care on part of defendant in feeding and caring for the cattle, made by the pleadings in the case. The question at issue and on trial was whether he had complied with his contract in caring for and feeding the cattle as he had bound himself to do by the provisions of his contract, and the contract itself fixed and determined the measure of his liability, and the degree of care or diligence he was bound to exercise in this regard.

In disregard of the requirements of the contract as to defendant's duty in the premises, the jury were authorized to find a compliance by defendant with the terms of his agreement therein contained, by his taking reasonable care of the cattle with reference to the condition in which he took them, and they were further authorized to find what was such reasonable care under the circumstances. The written contract defining the duty of defendant in taking care of the cattle was by this charge eliminated from the case, and the jury were in effect permitted to ignore it, and to disregard the standard by which defendant's duty and obligations were fixed and determined, and to ascertain and determine the measure of defendant's duty by a standard of their own based on "reasonable care" under the circumstances of the case, of which they were made the sole judges by the court. This was virtually substituting a new and different contract for that made by the parties to the action, or rather remitting the parties to their rights at common law in the absence of any contract

defining defendant's duty in the premises. For it is well settled in the absence of any agreement on his part defendant would have been bound to take reasonable care of the cattle entrusted to his keeping. (Rey *v.* Toney, 24 Mo., 600.)

And it cannot be seriously contended that the parties may not by express stipulation, as in this case, contract for a higher or particular kind of care and diligence in regard to the manner in which the cattle were to be fed and kept, and that this contract was valid and binding.

Whether to winter the cattle on hay, straw, and stalk fields until grass came, and keeping them in enclosed partures on good grass until August 15th, 1881, and then feeding them all the corn they would eat each and every day thereafter until they were delivered to plaintiffs, would or would not be "reasonable care" on the part of defendant, in the absence of any agreement between the parties in this case, might be a question of fact for the jury to determine. But where, by express stipulations, defendant became so bound, the jury would have no right to determine whether the performance by defendant of his stipulations was reasonable care, but would be restricted to finding whether or not he had complied with his contract; and even if the jury had found that defendant took reasonable care of the cattle, this would not have been sufficient, for the written contract required something more than reasonable or ordinary care, and specifically defined and declared the manner in which the cattle should be fed and kept while in defendant's custody under the contract. From the charge, the jury may well have regarded that the stipulations in the written contract in regard to the care and feeding of the cattle by defendant were not reasonable, but were unreasonable, and therefore have entirely disregarded them in arriving at their verdict as to the rights of the parties; and in this view the charge

was erroneous, prejudicial to the plaintiffs, and misleading to the jury as to their true functions and duty in the premises.

XI.

The court erred in charging as stated in the 14th assignment (*supra*, p. 23).

This portion of the charge is subject to the objections taken at the time it was given to the jury—that in determining the right of possession to the cattle, it restricts the jury to finding damage in value to the cattle fed and cared for by defendant, and does not require them to take into consideration the damages to plaintiffs from the loss by death, or otherwise, of any of the cattle lost or not delivered to plaintiffs, through defendant's failure to comply with his contract, or through his wrongful failure to make the cattle increase in weight to the extent of his agreement, and was a virtual direction from the court to the jury to find for defendant in the replevin suit.

For it must be conceded that the twelve hundred and twenty-nine head of cattle taken under the writ of replevin, whose average weight was nine hundred and fifty pounds when delivered to defendant, would not be damaged in value when increased to the average weight of twelve hundred and twenty-six pounds, but would be increased in value, in the language of the charge. It was not disputed that the cattle received by plaintiffs in the replevin suit had been increased from the average weight of nine hundred and fifty pounds to the average weight of twelve hundred and twenty-six pounds, and that the increased weight was reasonably worth five cents per pound; and plaintiffs asked for an instruction, which was refused (No. 12), deducting this increased weight at five cents per pound from their damages they had sustained by reason of

defendant's failure to increase the average weight of the cattle to fourteen hundred pounds per head, and from the loss of the remainder of the cattle occasioned by defendant's carelessness and neglect in feeding and caring for them while they were in his custody under the contract. The jury were authorized by the charge given to find for the defendant in the replevin suit, if they found he was entitled to anything for the care and feed of these cattle, without deducting the damages plaintiffs may have sustained by reason of the breaches of his contract, except such as plaintiffs may have sustained by reason of defendant damaging said cattle in the replevin suit in value by caring for and feeding them.

As we have seen, the right of defendant to possession of the cattle in the replevin suit depended on the question whether, under the contract in evidence, the damages to plaintiffs, by reason of the breaches thereof as complained of and as shown in evidence, equalled or exceeded the increased value of the cattle involved in the replevin suit, and all damages plaintiffs may have sustained under said contract and shown in evidence should be deducted, and would go to the reduction and extinguishment of defendant's lien and claim on the cattle for their increased value by reason of the added weight placed upon the cattle in the replevin suit during the time they were in his possession.

The contract was not for the care and feeding of the twelve hundred and twenty-nine cattle involved in the replevin suit alone, but for the care and feeding of the fifteen hundred cattle delivered to defendant under the contract, and it was not for the cattle to be increased in weight to twelve hundred and twenty-six pounds on an average, but to fourteen hundred pounds on an average. Therefore, all damages which plaintiffs may have sustained by reason of the failure of defendant to deliver

the two hundred and sixty-one cattle, or any of them, which were lost or died through defendant's neglect to properly care for and feed them according to the terms of his contract, and all damages which plaintiffs may have sustained by reason of defendant's failure to make the cattle weigh fourteen hundred pounds on an average, were proper and absolutely necessary to be taken into consideration by the jury in determining, not whether defendant had increased the cattle in the replevin suit in value, or damaged them in value, but whether under the contract defendant was entitled to possession of the cattle, by reason of his having a claim and lien on them, for anything after deducting these damages from the increased value of the cattle involved in that suit. If on the whole case plaintiffs' damages exceeded or equalled the value added to the twelve hundred and twenty-nine cattle by defendant, which plaintiff had obtained by the writ of replevin, plaintiffs could recover these damages against defendant's claim to extinguish it, and they were entitled to retain the possession of their own cattle, on which defendant had no claim or lien, and to a judgment for the possession of the cattle in their favor in the replevin suit, and they would not be compelled to resort or look to the action on the contract to recover these damages or have them allowed in their favor.

But the court, in that portion of the charge immediately following, expressly directs the jury that they must not consider these damages in the replevin suit. The court charges the jury that—

"In the replevin suit they can only determine whether the plaintiffs or defendant is entitled to the possession of the cattle and damages as stated. The determination of the amount of damages sustained by one or the other parties as to the treatment and care of the cattle is the subject-matter in controversy in the second suit—the suit for damages on the contract."

To this portion of the charge plaintiffs duly excepted at the time for the reasons stated in the bill of exceptions—that the jury in determining the right of possession of the cattle replevied in the replevin suit were restricted from taking into consideration the damages sustained by plaintiffs by the failure of defendant to comply with his contract under which he received the fifteen hundred cattle, to feed and care for said cattle so received, and from damages the plaintiffs may have shown by the evidence they had sustained by reason of the loss of any of said cattle, or the wrongful acts of defendant.

Under the authorities cited, and for the reasons above given, it is submitted, the objections were well taken and should have been sustained.

XII.

The court erred in giving to the jury the modification of its charges, as follows:

"I desire to modify the instructions regarding your finding, and now instruct you that in case you find the issue in the replevin suit for the defendant, you should at the same time find the value of the cattle taken by Teal & Co. from the defendant Bilby, and also the amount of interest defendant had in the cattle." (See *supra*, p. 24.)

This modification of the instructions does not inform the jury as to what portion of the entire charge is modified or changed or withdrawn from their consideration. It does not instruct the jury as to the law in making their finding the issue in favor of defendant, or how they are to determine whether defendant had any interest in the cattle, or the amount of his interest, or what portion of the charge of the court is to be considered by them in finding the issue in said suit, or in

determining the value of defendant's interest in the cattle.

It leaves the jury virtually, without any instruction, in making up their verdict in regard to defendant's interest in the cattle, and to determine for themselves, without the aid of the court, as to what part of the charge they shall consider, and what part of it they shall reject as modified.

The modified instruction as to the finding the issue in the replevin suit is undoubtedly correct so far as the jury were to find the value of the cattle taken by plaintiffs and the interest of the defendant, if any, therein, leaving out the assumption by the court that defendant had such interest. But how are the jury to find the interest of defendant in the cattle? By considering whether he had added anything to their value, as the jury had been previously instructed? By deducting the damages in value to these cattle from the increased value put upon them by defendant? Or by deducting from the increased value of the cattle the entire damages plaintiffs may have sustained by reason of defendant's default in failing to comply with his contract? The charge is wholly silent as to these vital points in the case, and the jury are left to grope their way through a long, confused, and contradictory charge to determine for themselves what portion of it has been modified or changed, and, at last, are left to their own judgment and discretion, without any guidance from the court, in determining the measure of defendant's liability and in ascertaining the amount of defendant's interest in the cattle.

That the court is bound to declare the law to the jury governing the measure of damages in suits of this character, and to furnish them with the proper rules of law to enable the jury to ascertain the rights of the parties to the property in dispute, is too plain for argu-

ment or citation; and this duty is clearly recognized by the court in its various attempts in the charge to instruct the jury regarding the rules for assessing damages. Finding at the close of the charge that erroneous and contradictory and misleading rules had been given to the jury, the court virtually commits the whole matter to the unguided and uninformed discretion of the jury, and leaves to their own good-will and pleasure to find, without the aid of the law, the entire issue of the right of possession of defendant to the cattle in controversy, assuming that defendant had an interest therein, and simply directing them to find the value of the cattle and defendant's interest therein.

This final abdication and surrender to the jury of the proper and necessary power and function of the court to declare the law of the case by appropriate instructions to the jury, taken in connection with the partial charge which preceded it, could have but one result: A verdict against the law and against the evidence, in favor of defendant, whereby plaintiffs, after suffering the loss of two hundred and sixty-one of their cattle intrusted to defendant, who had obligated himself in the strongest possible manner to so care for and feed all of said cattle that they would increase four hundred pounds in weight on an average, were not only deprived of all compensation and denied all damage for such loss and for the failure of defendant to bring the cattle to this increased weight, but were compelled by the verdict of the jury and the judgment of the court to pay defendant nearly twenty-four thousand dollars and all costs of suit in order to retain possession of their remaining cattle which had survived the long course of neglectful, careless, and cruel treatment to which they had been subjected while in the hands of defendant.

The last assignment of errors arises on the rejection

by the court of testimony offered by plaintiffs in depositions as to the market price for the cattle at Chicago, that being the nearest market to Dawsonville. (Rec., 51, p. 25.) This was competent testimony as showing the value of the cattle in fact, compared with what it would have been if the cattle had been properly cared for and attended to. But, aside from the testimony in itself, the court permitted Bilby to give proof on his side as to this very matter. (Rec., 51, p. 34.) Certainly the other party should have had a fair and equal show in this respect. Indeed, how else could this very material question be solved?

Then it would appear, quite clearly, that the jury on the trial did not have the law of the case properly presented to them, nor were the facts allowed to be produced fully before them. And it is therefore respectfully submitted the case (cases) should be reversed.

JAMES S. BOTSFORD,
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For Plaintiffs.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1887.

JOSEPH TEAL, HENRY COLEMAN, JOHN V. TODD AND JOHN S. STORRS, PARTNERS, UNDER THE NAME OF J. TEAL & CO.,

Plaintiffs in Error.

vs.

JOHN S. BILBY,

Defendant in Error.

Nos. 51 and 52.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION.

STATEMENT AND ARGUMENT FOR DEFENDANT.

WM. WARNER,
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Attorneys for Defendant.

KANSAS CITY:
GERARD BROS. & WOODY PRINT, ALAMO BUILDING, SEVENTH AND DELAWARE.
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STATEMENT.

We do not deem the statement in the plaintiff's brief sufficiently full to a thorough understanding of the records in these two cases, and we add the following by way of supplement.

Case No. 51, the replevin suit, was commenced December 1, 1881. (Record 51, p. 2 and 3,) and the summons and the order for the delivery of the 1,500 head of cattle, being the writ of replevin, was issued the same day. (*Ibid* 3, 4, 5, 6.) The summons was served December 3, 1881, and the writ of replevin was executed on December 7, 1881, by the Marshal taking 1,229 head of cattle from the possession of defendant and delivering them to the plaintiffs. (*Ibid* p 5 and 6.)

The petition in this case simply alleged that the plaintiffs were the owners of and entitled to the possession of the 1,500 head of cattle, and that defendant wrongfully retained the same and asked judgment for their recovery and for $25,000 damages for their detention. (*Ibid* 3) The petition was verified by one of the plaintiffs, as required by the Missouri statute, and alleged that the value of the cattle was $75,000, and that the plaintiffs were in danger of losing the cattle unless they were taken from the possession of the defendant. This petition and affidavit and a bond given by the plaintiffs to the defendant authorized the issuance of the writ of replevy and the delivery of the cattle ~~to the cattle~~ to the plaintiffs in advance of the trial of the case on its merits. The statute of Missouri on this precise point is as follows:

Revised Statutes 1879, Chap. 63, Sec. 3845:

Upon filing such affidavit, the Court, or Judge or Clerk in vacation, shall make an order requiring the defendant to deliver the property specified in the affidavit to the Sheriff, and requiring the Sheriff, if the same be not delivered to him, to take it from the defendant and deliver it to the plaintiff. (G. S., 664, Sec. 2.)

Sec. 3846:

The Sheriff shall not receive or take such property

until the plaintiff shall deliver to him a bond, executed by two or more sufficient securities, approved by the Sheriff, to the effect that they are bound to the defendant in double the value of the property stated in the affidavit, for the prosecution of the action with effect and without delay, for the return of the property to the defendant, if return thereof be adjudged, and, in default of such delivery, for the payment of the assessed value of such property, and for the payment of all damages for the taking and the detention thereof, and for all costs which may accrue in the action. (G. S. 664, Sec. 3–b.)

Sec. 3847:

Upon such bond being executed as aforesaid, the Sheriff shall receive the property, or, if the same be not delivered, shall take the property and deliver it to the plaintiff, unless, before such delivery to the plaintiff, the defendant shall, with two or more sufficient securities, to be approved by the Sheriff, execute a bond to the plaintiff to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery of such property to the plaintiff, if such deliver be adjudged, and, in fault of such delivery, for the payment of the assessed value of such property, and for the payment of all damages for injuries to the property, and for the taking and detention, or detention thereof, and all costs which may accrue in the action. (G. S. 664, Sec. 4–c.)

The amended answer in this case, filed Oct. 12th, 1882, on which the case was tried, set up that the defendant was entitled to the possession of the cattle at the commencement of the suit, for the reason that they were delivered by the plaintiffs to the defendant on or about November 2nd, 1880, to be fed and cared for by him; that he did feed and care for them; that a number died

while in his charge without fault or negligence on his part, and that he became entitled to $30,000 for his feed and care, less $1,000 paid by plaintiffs on September 1st, 1881. And further that he advanced freight and feed bills to the railroad company on the cattle in November, 1881, to the amount of $1,166. And finally, that the cattle in his possession were pledged for the amount due him for caring and feeding them and for his advances, and demanded judgment for the return of the cattle, and for damages for the taking and detention thereof in the sum of $30,400, with six per cent interest from December 7th, 1881, and costs. (*Ibid* 8 and 9).

On same day plaintiffs filed their reply to the amended answer, denying each and every allegation thereof, and further alleging that the matters and things in the amended answer stated were stated and plead in the other suit pending, (referring to Suit Record 52), and asking judgment as demanded in their petition. (*Ibid* 9 and 10). Case No. 52, the suit by plaintiffs for damages on the written contract, was commenced on December 23d, 1881 (Record 52, p. 1).

The petition in this case alleges that the 1,500 head of cattle in question were delivered by the plaintiffs to the defendant in November, 1881, under the following written contract:

"This contract, entered on this day, November 3d, 1880, by and between J. Teal & Co., of Portland, Multnomah County, Oregon, of the first part, and John S. Bilby, of Fairview, Nodaway County, Missouri, of the second part, is as follows: J. Teal & Co. to weigh fifteen hundred (1,500) cattle at the transfer stock yards, Council Bluffs, Iowa, after feeding, watering and then shrinking twelve hours, to be delivered to John S. Bilby, at Dawsonville, Missouri, said cattle to be watered, fed,

weighed and handled by Rosenbaum, Bass & Co., transfer stock yards, Council Bluffs, Iowa. The cattle to be delivered to John S. Bilby shall be the same that J. Teal & Co. drove this year from Wasco County, Oregon, to Rock Creek, Wyoming Territory, branded with 'T' on the left side, similar in age, flesh and quality to a train load that arrived at Council Bluffs, Iowa, on Saturday, October the 17th, 1880, Mr. Bass, of the firm of Rosenbaum, Bass & Co., to be the judge of the cattle arriving, whether or not they are an average lot with the train load which arrived on Saturday, October the 17th, 1880. If any train cattle shall arrive prior to twelve o'clock, m., they shall be taken off, fed and watered the same evening of the day of arrival at seven o'clock, p. m. Said John S. Bilby agrees to take these cattle and winter them well on hay, straw and stock-fields until grass comes; to be kept in enclosed pastures on good grass until the 15th of August, 1881, after which date on each and every day they shall be fed all the corn they will eat until delivered to J. Teal & Co. John S. Bilby agrees to deliver the same cattle at Dawsonville, Missouri, after weighing them at the nearest scales to any feed lot where each bunch of cattle may feed, after a twelve hours' shrink, such shrink to be within the same hours as when the cattle were first weighed and delivered. Cattle to be shrunk between seven in the evening and seven in the morning. In case J. Teal & Co. shall not take the entire bunch as fed in any one yard, they shall come and make selections of such cattle as they wish to cut out, from two to five days prior to the day of weighing. Said cattle to be weighed and delivered in lots of from one hundred and seventy-five (175) to two hundred and twenty-five (225), between the 15th day of October, 1881, and the first day of December, 1881, by giving ten days' notice, either by telegram, letter or in person, at the option of J. Teal & Co., J. Teal &

Co. agreeing to pay five cents per pound for all increase of weights from time of weighing to Bilby to time of weighing back to J. Teal & Co. They further agree to advance one thousand (1,000) dollars to John S. Bilby on the first day of September, 1881, to be applied to the payment of weights added to cattle on last delivery, John S. Bilby to be responsible for all cattle lost, strayed or stolen, and for any dying through the neglect or carelessness of the said John S. Bilby; any dying through causes unvoidable shall be shared thus: J. Teal & Co. to bear the loss of the steers and John S. Bilby the feed. If any steer die, John S. Bilby shall preserve the hide as evidence of death, and the ears if there are any ear-marks. It is further agreed that if the said John S. Bilby shall pay the freight on said cattle from Council Bluffs to to Dawsonville, Missouri, he shall be allowed ten per cent interest on said money and the amount to be paid on delivery of cattle to said J. Teal & Co. The said John S. Bilby agrees that if said cattle remain in his possession until December 1st, 1881, that he shall so feed and care for them that they will increase in weight four hundred and fifty (450) pounds each on an average.

"JOSEPH TEAL & CO.
"JOHN S. BILBY."

"JOHN N. BALDWIN, Witness.

And the petition further alleges that the defendant kept said cattle until the plaintiff took them from him under writ of replevin in December, 1881 (in case No. 51); that the defendant did not comply with the written contract in that he failed by neglect to increase the weight of the cattle 450 pounds per head on an average, and that he only increased their weight 326 pounds per head on an average; that if the cattle had been increased in weight 450 pounds per head they would have been worth to the plaintiffs $98 per head, and that the cattle

in the condition they were when plaintiffs replevied them where not then and there, worth more than $44 per head.

That plaintiffs did not obtain from the defendant by the writ of replevy 271 of the 1500 head of cattle entrusted to the defendant, and that said 271 cattle were worth $26,000.

And the plaintiffs prayed judgment for $92,366, with interest and costs.

On May 22nd, 1882, the defendant filed his answer to the said petition (*Ibid* 7 to 13), the material portions of which in *haec verba* is as follows:

"The defendant, further answering, declares the facts to be as follows: That on the third day of November, A. D. 1880, Joseph Teal & Co., a firm composed of said named plaintiffs, entered into a certain written contract with said defendant concerning the feeding and care of fifteen hundred head of cattle, which are the same cattle described in plaintiffs' petition, which said contract is the same contract that is set forth in plaintiffs' petition.

"The defendant further states that by the terms of said contract the fifteen hundred head of cattle to be received by the defendant were to be similar in age, flesh and quality to a train load of cattle that arrived at Council Bluffs, Iowa, on Sunday, October 17th, 1880; that the Rosenbaum, Bass & Co. named in said contract were the cattle commission men and agents of the plaintiffs' firm, J. Teal & Co., at Council Bluffs, Iowa, to receive, handle and dispose of plaintiffs' cattle; that on the 17th day of October, 1880, a certain train load of cattle had been received at Council Bluffs, Iowa, which cattle had been seen and examined by said Bass, of said firm of Rosenbaum, Bass & Co., which fact was at the time of the ex-

ecution of said contract known to the defendant herein, and the defendant, relying on the statements of the plaintiffs, J. Teal & Co., as to the quality of said cattle, and the plaintiffs' representations as to the knowledge and judgment of said Bass, was induced to enter into said contract, whereby said Bass was to be the judge of the cattle arriving, whether or not they were an average lot with the train load which arrived on Sunday, October 17th 1880, at Council Bluffs, Iowa; that upon the arrival of said fifteen hundred head of cattle at Council Bluffs, Iowa, the plaintiffs, J. Teal & Co., represented the same to be in all respects equal to the said train load of cattle which had arrived at Council Bluffs as aforesaid on said Sunday, October the 17th, 1880, and said Bass represented said cattle to be an average lot with the train load which had arrived on Sunday, October the 17th, 1880, at Council Bluffs, Iowa; that the —— Creek, Wyoming Territory, branded with 'T' on the left side, similar in age, flesh and quality to a train load that arrived at Council Bluffs, Iowa, on Sunday, October the 17th, 1880. Mr. Bass, of the firm of Rosenbaum, Bass & Co., to be the judge of cattle arriving, whether or not they are an average lot with the train which arrived on Sunday, October 17th, 1880.

"If any train of cattle shall arrive prior to twelve o'clock m. they shall be taken off, fed and watered the same evening of the day of arrival at seven o'clock p. m. If they shall arrive after twelve o'clock m. they shall be shut off of feed and water at seven o'clock p. m. of the following day. Said John S. Bilby agrees to take these cattle and winter them well on hay, straw and stalk-fields until grass comes; to be kept in enclosed pasture on good grass until the 15th of August, 1881, after which date on each and every day they shall be fed all the corn they will eat until delivered to J. Teal & Co. John S. Bilby

agrees to deliver the same cattle at Dawsonville, Missouri, after weighing them at the nearest scales, to any feed lot where each bunch of cattle may feed after a twelve-hours' shrink, such shrink to be within the same hours as when the cattle were first weighed and delivered; cattle to be shrunk between seven in the evening and seven in the morning. In case J. Teal & Co. shall not take the entire bunch as fed in any one yard they shall come and make selections of such cattle as they wish cut out from two to five days prior to the day of weighing, said cattle to be weighed and delivered in lots of from one hundred and seventy-five '175) to two hundred and twenty. Defendant then and there relying on the representations of the plaintiffs, and believing the same to be true, not knowing that said Mr. Bass was in any manner deceived, but was in possession of all the knowledge and the full facts necessary to form a proper judgment concerning said cattle, accepted and received the same to the number aforesaid. Defendant alleges that the said fifteen hundred head of cattle were not as represented by the plaintiffs, J. Teal & Co.; that they were not an average lot with the train load which arrived on Sunday, October the 17th, 1880, at Council Bluffs, Iowa; that said cattle were the greater part of a herd that had been snowed in and detained at or in the vicinity of Rock Creek, in Wyoming Territory, from and after said 17th day of October, 1880, until the 30th day of November following; that the said cattle had during all of said time been exposed to severe storms and cold weather, and starved without either food or water until many of them perished; that they were loaded on cars at or near Rock Creek aforesaid, and still further exposed to the inclemency of the weather, and being still without food or water, and shipped to Council Bluffs, Iowa, that many died on the road from starvation and exposure; that the

plaintiffs, J. Teal & Co., to further deceive and impose on the said Bass and this defendant, caused the cars on which said cattle were loaded to be stopped before reaching said stock yards at Council Bluffs, and the dead cattle removed therefrom; that after said 17th day of October, 1880, and before said cattle reached Council Bluffs, Iowa, many of them were so badly frozen and injured thereby that the flesh afterwards came off of said cattle in pieces, and said cattle were so frozen and injured that they never did fully recover therefrom and the effects of the same; that many of the said cattle were in a dying condition when they were received by the defendant, of all which facts the defendant and said Bass were ignorant at the time; but that all of said facts were well known to said J. Teal & Co., but were by them entirely concealed for the purpose of deceiving and imposing on said Bass, and deceiving and defrauding the defendant, plaintiffs well knowing that said Bass was judging of said cattle, and the defendant receiving the same, wholly ignorant of the fact that said cattle had been frozen, mistreated and abused as aforesaid, and of their real condition; that by reason of said abuse, mistreatment and freezing said cattle were less able to endure the following winter after their delivery to the defendant, and many of said cattle died before they could recuperate from the injurious effects produced as aforesaid; that the defendant, after the receipt of the said cattle, caused them to be reloaded on cars at said Council Bluffs, Iowa, and as soon thereafter as possible shipped them to Dawsonville, Missouri, the nearest railroad station to Fairview, Nodaway county, Missouri, the place at or near which said cattle were to be kept; that when said cattle were unloaded at Dawsonville, Missouri, many of them were so weak, sick, sore and lame from the treatment and exposure aforesaid that twenty-five head of said cattle were unable to travel from

said station to defendant's farms, at and in the vicinity of Fairview aforesaid, but fell down and died on the way thither, although handled and driven with great care by the defendant, and that within thirty days thereafter one hundred and seventy-five more of said cattle died from the said cause, namely, the mistreatment, freezing and starving aforesaid; that many of said cattle languished and lingered through the winter, but never recovered from the effects of the treatment and injuries aforesaid; that afterwards, at different periods, seventy other head of said cattle died of disease produced by the treatment, freezing and exposure aforesaid, or in consequence of their enfeebled condition occasioned thereby; that none of said cattle were lost, strayed or stolen, and none died through the neglect or carelessness of the defendant; that all of said cattle thus accounted for were lost and died through causes unavoidable on the part of said defendant.

"Defendant further avers that in pursuance with the terms of said contract he did preserve the hides of such steers as died, and the ears of such steers as died having ear marks, except a few which died on the river bank and by the rising of the river were covered by the water, and subsequently frozen in the ice, which fact was reported to and otherwise well known to plaintiffs, and the death of said cattle and their identity as being part of the said fifteen hundred admitted by plaintiffs, and the cutting of the same out of the ice in which they were thus frozen was expressly waived by plaintiffs at the time defendant proposed and undertook to cut the same from the ice to preserve the hides and ears, if the same had any ear marks, pursuant to the said contract; that the said plaintiffs afterwards agreed to and *and* with defendant upon a definite time when they would receive the said hides and ears having ear marks, preserved from the cattle

dying as aforesaid, and that pursuant to such agreement the defendant tendered to plaintiffs the hides of the cattle dying as aforesaid, and the ears having ear marks, but notwithstanding the agreement by the plaintiff as aforesaid they refused to accept the same as proof of death of said cattle as stipulated by said contract, since which time said hides have spoiled and rotted either wholly or in part.

"Defendant further states that under and in pursuance of said contract he paid and advanced to the Wabash, St. Louis & Pacific Railway Company, on account of plaintiff, for the transportation and freight of said cattle from Council Bluffs, Iowa, to Dawsonville, Missouri, large sums of money, to-wit: On the 4th day of November, 1880, seven hundred and forty-two and 50-100 dollars; on the 5th day of November, 1880, two hundred and forty-seven and 50-100 dollars; on the 7th day of November, 1880, one hundred and sixty-five dollars, which and the interest thereon at the rate of ten per cent per annum from the date of the payments as aforesaid, as stipulated in said written contract, are still due the defendant.

"That on or about the 15th day of December, 1880, it appearing to the plaintiffs and defendant herein, and being so agreed between them, that by reason of the sorry condition to which said cattle had been reduced (notwithstanding the subsequent care and caution of the defendant) by the abuse, starving and freezing of the same and their consequently greatly reduced condition of flesh and vitality, that said cattle could not be wintered on hay, straw and stalk-fields, it was agreed by and between the said plaintiff and the defendant that the written contract should be abandoned in this regard, and the same was modified, by oral agreement, to the effect and extent that the defendant should put said cattle on corn

at that time, and so continue feeding them corn until they had sufficiently recovered from the injuries aforesaid received, as aforesaid, and had become by such feed sufficiently built up so that thereafter those that might survive could be fed on hay, straw and corn-stalks, as had been provided in the contract that they should be fed in the first instance; and it was also agreed at the same time that the time defendant should so feed said cattle corn in the winter of 1880 and 1881 should be deducted and taken from the time he should retain them in his custody and feed them on corn during the summer and fall of 1881 originally provided for in said contract; and it was further agreed between plaintiffs and defendant at the last said date that because and on account of the condition of the cattle as aforesaid, produced by the causes aforesaid, and in consideration of the defendant agreeing to continue to execute his part of said contract, modified as aforesaid, the plaintiffs should and did waive any and all rights they had under the original agreement to require the defendant to so feed and care for said cattle that they would increase in weight four hundred and fifty pounds each on an average, and all claims, if any, they otherwise had against the defendant because of his failure to increase the average weight of said cattle to the amount aforesaid; and it was at the same time agreed that the plaintiff should pay the defendant for the increased average weight of such cattle as might survive in excess of the weight thereof at the time they were delivered to him as aforesaid the price in the contract stipulated that he should receive per pound for the increased weight; that in pursuance of said contract, modified and changed as aforesaid, the defendant did feed said cattle on corn, all they would eat, from and after the 15th day of December, 1880, to the first day of March, 1881, a period of seventy-five days, on each and every day of

which time said cattle were fed all the corn they would eat, of all of which the plaintiffs had full knowledge at the time; that on the 27th day of September, 1881, the defendant notified the plaintiffs that their cattle were ready for delivery to them.

"Defendant states that the time for the delivery of said cattle by him to the plaintiffs, and the time when they should receive the same from him under the contract modified and changed as aforesaid, was the 15th day of September, 1881, of which fact the plaintiffs had full knowledge; but the plaintiffs neglected and refused from time to time thereafter to take said cattle, although the same were at all times after the last said date ready for delivery to plaintiffs, as they well knew; that on the 28th day of October, 1881, the defendant sought the plaintiffs and found them in the State of Iowa, and notified them in writing that said cattle were ready for delivery upon payment of the amount due defendant therein, and for his care of the same, and his other charges against them for freights advanced thereon as aforesaid; that the defendant then, on November the 1st and 2d, 1881, caused said cattle to be weighed, and the total weight thereof was one million five hundred and fifty-three thousand three hundred and five pounds. That plaintiffs neglected and refused to receive said cattle or to notify the defendant when they would receive the same, until the 15th day of November, 1881, when the defendant received a notice in words and figures as follows, to-wit:

"'To JOHN S. BILBY:

"'You are hereby notified that we will be ready to receive from you on the 1st day of December, 1881, the cattle consisting of fifteen hundred head of steers belonging to us and placed in your keeping under a written contract, dated November 3d, 1880, and we hereby notify

you that on said 1st day of December, 1881, we will demand said fifteen hundred head of steers at your hands.

" 'November 15th, 1881. TEAL & CO.'

"That the defendant did make arrangement to weigh and deliver said cattle to the plaintiffs at the time stated in their said notice; that on that on the night of November 30th, and also on the night following, when said cattle were lotted for weighing, the said plaintiffs, with intent to injure the defendant and make it appear that said cattle were lighter than they in fact were, did annoy, disturb and frighten them and thereby caused them to fall off greatly in weight, and shrink in weight on an average of fifteen pounds per head, to the damage of this defendant in the sum of two thousand two hundred and forty-five dollars.

"That the defendant did have said cattle, to-wit, twelve hundred and thirty-two head, at Dawsonville, Missouri, on the 2d day of December, 1881, and was then and there ready and willing to deliver the same to the plaintiffs, J. Teal & Co., upon the said J. Teal & Co. paying unto the defendant the sum justly due him for feeding and caring for said cattle and for the money advanced for freight on the same as aforesaid in the transportation of said cattle from Council Bluffs, Iowa, to said Dawsonville, Missouri, and for the damage caused and accruing to defendant by reason of the frightening, annoying, running and injuring said cattle as aforesaid, to-wit, the sum of twenty-nine thousand one hundred and thirty-six and 62-100 dollars.

"Defendant further avers that, notwithstanding plaintiffs' notice in writing aforesaid, being dated November 15th, 1881, wherein plaintiffs pretend and stated that they would receive said cattle on December 1st, 1881, and in conseqence of their said statement so made the

defendant drove said cattle to Dawsonville, Missouri, as soon thereafter as he could do so and conform to the time stated in said notice, and did have said cattle at said place, then the plaintiffs absolutely refused to receive them and pay the defendant for his interest therein accruing as aforesaid or any part thereof, but, on the contrary, sought to get possession of said cattle without paying the defendant anything whatever for his care bestowed thereon, or feed furnished by him to them, or freight paid thereon as aforesaid, or the injury done to said cattle by frightening and disturbing them as aforesaid, whereby said cattle were kept confined in lots and pens at Dawsonville aforesaid, from December the 2d, 1881, until December 9th, 1881, at which last date said cattle were taken from the defendant by the action in replevin commenced in this court by plaintiffs against the defendant for the recovery by them of the possession of said property.

"That during the said period of time that said cattle were kept by defendant at Dawsonville aforesaid, the defendant bestowed care continuously upon them and fed them, and that the value of the feed and care so bestowed upon them was the sum of one thousand dollars; that after the expiration of the contract as modified, as hereinbefore set forth, viz., in September, 1881, the said plaintiff refusing to receive or take away the said cattle as aforesaid, the defendant, between that date and December 1st, 1881, fed the said cattle thirty-seven thousand and two hundred bushels of corn, of the value of fifty cents per bushel, and during the same time bestowed care and labor upon the said cattle amounting to the sum of one thousand dollars.

"Wherefore the defendant prays judgment for the sum of fifty-one thousand nine hundred and eighty-one dollars and sixty-two cents and costs."

The reply of plaintiffs was a general denial. (*Ibid* 13.)

As stated in the plaintiffs' statement, the two cases were, by consent, tried together.

The plaintiffs' statement sets out, not with exactness, but, perhaps, in substance, what their testimony offered at the trial tended to prove.

We are not content to let the statement as to what defendants' testimony tended to prove rest as stated in plaintiffs' statement.

We believe it is sufficiently condensed in the bill of exceptions, and we therefore here quote it as there set out:

"Defendant to maintain the issues on his behalf, offered evidence to prove the following facts:

"*First*—That the Oregon trail cattle of plaintiffs arrived near Rock Creek station early in the month of October, 1880, very poor in flesh, and that they were held on the open range in the vicinity of Seven Miles Springs, northwest of Rock Creek station and the Soda Lakes, about 12 miles from Rock Creek; that there was very little grass in that vicinity, and water was very scarce; that there was no water there except the springs, the water of which is alkali; that the water on Rock Creek was standing in holes, no running water in it, and that most of the holes were frozen solid, a few not; that the Teal cattle arrived late in the season, and after other herds had been on the ground; that the snow came at and in the vicinity of Rock Creek very early that fall, the first snow being about the 20th day of September, and that during the time the cattle remained there, the weather was very severe, but not very cold until the middle of October; that for ten days previous to the latter part of October was very snowy and stormy, and that the

snow on the ground around Rock Creek, where the cattle were herded, was about four inches deep, and that the thermometer at times ranged from 25 to 30 degrees below zero; that the cattle, during the time they were held in the vicinity of Rock Creek, could get no water except the alkali water; that the range was bare of grass, the snow covered the ground, cattle could get nothing to eat, and that they were exposed to the snow and storms and cold weather while in that vicinity; that the herders of plaintiffs were two white men and six or seven others, Indians, who did not understand herding cattle; that the first shipment from Rock Creek was made Oct. 14th, 1880, of twenty cars eastward to Council Bluffs, and that these cattle were stronger and in better health and flesh than those shipped afterwards.

"That of the cattle that remained after the first shipment a portion had been held in the storms, and had been driven to Rock Creek once for shipment and back to Seven Miles Springs for want of cars. That these cattle were herded at Rock Creek before shipment, kept in pens one night, turned out, and held on the divide, where there was no feed, and penned again at night, then drove back to Seven Miles Springs, and afterwards again brought to Rock Creek station and loaded on cars about the last of October, 1880.

"That some twelve to fifteen of the cattle died on the range between Rock Creek and Soda Lakes, and that the cattle at the time of the shipment were very poor and weak, so that a number of them were down and had to be prodded up to get them up, and that one died in loading on the cars. That the water on the range was damaging to the cattle, and would have the effect of scouring them, make them weak and sick, caused the hair to come off after they were delivered to Bilby, and that the cattle would have a scabby appearance. That the cattle were

not carefully and judiciously handled while at and in the vicinity of Rock Creek. That they were herded by Indians, who handled them very roughly and jammed them around and close herded them, and that the cattle were damaged and injured while there by the treatment they had received, want of food and good water, exposure to storms and extreme cold weather, and from drinking the water strongly impregnated with alkali of Seven Miles Springs and Soda Lake.

"*Third*—Defendant further, to maintain the issues on his part, introduced evidence tending to prove that the Oregon trail cattle of plaintiffs commenced arriving on cars from Rock Creek station on the 17th day of October, 1880, and that there was one or two shipments between that date and November 1st, before any of the cattle which defendant received under the contract of November 3rd, 1880, had arrived at Council Bluffs. That of the shipment of cattle from which the fifteen hundred head delivered to defendant under said contract were taken there were a great many of them down in the cars on their arrival at Counell Bluffs, and a large number of them jammed and bruised, and others dead in the cars. That the cattle down in the cars on their arrival at Council Bluffs were so weak and exhausted for want of sufficient food and water that they had to be pulled out of the cars, and that cattle on arrival at Council Bluffs were in a poor condition as to flesh, and looked as if they had suffered from want of food and proper handling. That of the cattle that were down in the cars, and others of these shipments, at least fifty died either in the cars or after they had been placed in the pens at the stock yards at Council Bluffs, and their carcasses were sold by plaintiffs; and that others of these cattle were down in the yards and could not get up on account of weakness from want of food and water.

"That immediately on arrival the Teal cattle were given all the hay they could eat and all the water they could drink, as other cattle coming in the yards, and that said cattle had all the hay they could eat and all the water they could drink while in the stock yards; that the 2,600 or 2,700 head of Teal & Co.'s cattle at Council Bluffs were fed 90,000 lbs. of hay from Nov. 1st to Nov. 5th, 1880; that a portion of the first shipment of these cattle received by Bilby, amounting to about five hundred, were so fed and watered for three or four days, and that the cattle weighed more by reason thereof by between 25 and 50 lbs. than they otherwise would have weighed if they had been taken off, fed, and watered the same day of arrival, or the day thereafter, as provided by the contract; that the cattle were not shrunk before weighing, as provided by the contract, and this was unknown to the defendant and to said Bass. That defendant did not examine the cattle on their arrival at Council Bluffs until after they were weighed, and that he had no personal knowledge of the manner they had been treated after arrival at Rock Creek station, and before arrival at Council Bluffs, and was not informed thereof by plaintiffs at any time.

"That said A. V. Bass, mentioned in the contract as the judge of the cattle as to age, flesh, and quality, did not look after the matter of the selection of weight of the cattle, except as to the thirteen hundred head which he delivered to defendant, although he knew of the weighing of the other two hundred head for the defendant.

"That said Bass did not know anything about how the cattle (delivered to the defendant under the contract) had been treated between October 17th and November 1st, 1880, at and in the vicinity of Rock Creek station.

"Defendant introduced evidence tending to prove that the time A. V. Bass undertook to act as judge between plaintiffs and defendant as to the kind of cattle that plaintiffs should deliver to defendant under said contract, the firm of which the said A. V. Bass was a member was receiving a commission of fifty cents per head on each and every head of cattle delivered by the plaintiffs to defendant under said contract, which fact was unknown to defendant at the time of his receiving said cattle.

"That 1,300 head of said cattle were taken to Dawsonville by defendant on the cars about November 4th, 1880, and were in no better condition when shipped than when they arrived at Council Bluffs, except that they had been fully fed and watered; that in shipping the cattle on board the cars at Council Bluffs for Dawsonville some of the cattle were so weak, from want of proper food and care, and others were not in a fit condition to ship at all, owing to their weak and debilitated condition, and that on arrival of cars at Dawsonville there was one of said cattle dead in the cars.

"The defendant introduced evidence tending to show that the agent of the plaintiffs accompanied the cattle from Council Bluffs to Dawsonville for the purpose of delivering the same at Dawsonville to the defendant, and also for the purpose of examining and ascertaining the fields of the defendant and his facilities for carrying out the contract for the keeping of the cattle.

"Defendant introduced evidence tending to show that he was the owner of a large body of land, consisting of about fourteen thousand (14,000) acres, and had abundance of pastures, hay, straw, and stalk fields and corn for carrying out the contract, and that the said land was well supplied with good living water.

"Defendant introduced evidence tending to show that the agent of plaintiffs who accompanied the first

thirteen hundred head of cattle was present at Dawsonville, and superintended their unloading from the cars and delivery at that place to the defendant; and that the defendant then engaged a sufficient number of men to take charge of the cattle, and that they were unloaded as rapidly as possible. That upon their arrival at Dawsonville they were in a very weak condition. That they were properly handled while there, and with care driven to defendant's farm, a distance of about eight miles, having on the drive an abundance of food and water.

"Defendant introduced evidence tending to prove that from the time the fifteen hundred cattle were received by the defendant at Dawsonville up to the time of the delivery at Dawsonville in December, 1881, they had been in charge of careful, prudent, and experienced feeders, being kept all the time in pastures and feed-pens, and fed in accordance with the terms of the written contract and as the same was modified in December, 1880.

"Defendant further introduced evidence tending to prove that a part of the cattle delivered to the defendant by plaintiffs were not a part of the herd which the sample lot belonged to, and that this fact was unknown to the defendant or his agent when said cattle were received and examined by the defendant Bilby at Dawsonville.

Fourth—Defendant further, to maintain the issues on his part, introduced evidence tending to prove that on the arrival of the fifteen hundred head of cattle received by him under the contract of November 3rd, 1880, said cattle were in a feverish condition, were unloaded as rapidly as possible from the cars, divided into herds, and driven carefully and slowly, and as soon thereafter as practical from Dawsonville to pastures near Fairview, about eight miles distant, and that 1,100 head of them were turned on good grass pastures for a few days, and

that such pasturing was best for the cattle, after which they were placed in stock fields, where they had access to straw stacks, hay, and good water.

"That the balance of the cattle were driven by Wishard slowly about ten miles southwest of Dawsonville and placed in a pasture field of wild and tame grass, with stacked hay, straw and corn stalks, where they remained about four weeks, with plenty of feed and good water, and that thereafter they were placed upon stock pasture with hay, straw and cornstalks. That in driving the cattle from Dawsonville to the various pasture fields from five to ten of them died from weakness and exhaustion, and within thirty days thereafter from twenty-five to thirty died in the fields from same causes, and that the cattle were in very poor condition, weak and thin, and did not improve upon the feed they were receiving.

"Defendant introduced evidence tending to prove that about four hundred of the defendant's cattle ran with the cattle received from plaintiffs, fed the same and received the same treatment, and that out of these two hundred only two died, and that the defendant sold a large number of his cattle in the Chicago markets during winter of 1880 and 1881 as fatted beef cattle which had received precisely the same care and feed as plaintiff's; that plaintiff Coleman took charge himself of one of such shipments by defendant to Chicago.

"That defendant introduced evidence tending to prove that the three hundred head of cattle which arrived at Council Bluffs October 17th, and referred to in the written contract as the sample lot, were a picked lot of younger and stronger cattle, and in better flesh than those which followed. The cattle afterwards received by Bilby were a mixed lot of cattle whose ages ranged from two to eleven years, and that the cattle received by Bilby were remnants or tailings of the herd.

"That Teal & Co. had become indebted to Rosenbaum, Bass and Company, their commission merchants, in a considerable sum, and that they had previously sold all the cattle belonging to the herd driven by them from Oregon to Rock Creek, and afterwards shipped to Council Bluffs, which were available for sale. And that there were cattle delivered to the defendant at Dawsonville which did not belong to the herd from which the sample lot of October 17th, 1880, were taken, but that the plaintiffs had procured during the cold season preceding November 1st certain other cattle at Cheyenne, Wyoming Territory, which they delivered to the defendant as part of the herd from which the sample lot had been selected, which fact was unknown to Bass and defendant.

"The defendant introduced evidence tending to show that the appearance of the cattle when they were delivered to him by the plaintiffs would not disclose the treatment they had received previously, and that it required time to develop the evil effects of such treatment; that although the cattle might appear to be very thin and weak, yet it would not be apparent that they were diseased; on the contrary, experienced cattlemen might well suppose that they would, upon the treatment provided for in the contract, soon recover their flesh and strength.

"He also introduced testimony tending to show, not only the death of two hundred and sixty-eight of the cattle as aforesaid, but that as to many of the others that survived the winter of 1880 and 1881, although they were fed upon corn, all they could eat during the winter, they always presented a scabby appearance and did not thrive from their food, and that when the spring came they were placed upon grass. They did not shed their hair, but were, in the language of a number of the witnesses, "stuck cattle."

"And that upon an examination of the cattle, it was considered by said Coleman and defendant that the cattle could not be wintered on hay, straw, and stock fields, and it was a few days thereafter finally agreed upon between Coleman and defendant that defendant should let the cattle into corn, and whatever time that they went into corn that winter should be deducted off of the corn feed next year at the end of the next grain feeding, and that defendant should also be released from the stipulation of the written contract requiring him to increase the average weight of the cattle four hundred and fifty pounds per head.

"Defendant introduced evidence tending to show that—the time the defendant received the cattle from the plaintiffs to September 1st, 1881, all the plaintiffs except Coleman were residing in the State of Oregon: *that the plaintiff Coleman accompanied these cattle from Oregon to Council Bluffs; that on the 4th of December the plaintiff Coleman went to defendant's house, and remained there for a period of fifty-nine days, seeing these cattle every day; was familiar with the manner in which they were being fed, and assisted in taking care of the same, having the use of the defendant's horses for the purpose of riding over the fields and pastures to inspect the cattle, and after the expiration of the fifty-nine days to the first of September, 1881, he remained on the defendant's farm, boarding with one of the defendant's tenants where these cattle were being kept, and was familiar with the manner in which they were being fed and their treatment, and that during all that time, from the fourth day of December, 1880, to the 1st day of September, 1881, he made no complaint as to the treatment these cattle received from the defendant.*

"That on the 1st day of September, 1881, the plaintiffs paid the defendant one thousand (1,000) dollars for

feeding said cattle, and that all of the two hundred and sixty-eight cattle excepting two had died prior to the said first of September, and that it was through no fault or negligence of defendant that any of plaintiffs' cattle died while in his care, but that they died through unavoidable causes.

"Defendant further introduced evidence tending to prove that plaintiff Coleman had made statements thereafter to various witnesses on different occasions which tended to prove that the contract had been changed as testified to by defendant.

"Defendant then introduced evidence tending to prove that immediately after the said change and modifications of the written contract defendant placed said cattle in stock fields and cornfields which contained good corn in the ear, and that they were fed, except for a few days, from that time forth, through and during the winter of 1880 and 1881, all the corn and feed that they would eat, but that many of said cattle were in such weak and exhausted condition from previous bad treatment before Bilby had received the cattle that a large number of them, amounting to two hundred and sixty-eight, died while in possession of Bilby. That said cattle were fed about seventy-five days during said winter of 1880 and 1881 on corn and stock fields, were placed in good grass pastures in the spring of 1881; after grass came in enclosed grass pastures on good grass, with plenty of water, until August the 15th, 1881, except a part of them for a short time were placed on prairie, where there was good grass, and fenced all around, except the road openings, and these were guarded, when the cattle were fed with all the corn that they could eat until November 1st, 1881. That on the 28th day of October, 1881, defendant served plaintiffs with the following notice:

"'To JOSEPH TEAL:

"'SIRS: You will take notice that on Monday, the 31st day of October, 1881, I shall begin to weigh and complete the weighing, as soon as practicable, of the steers placed in my keeping under contract with you in the fall of 1880. Under and by virtue of said contract as finally made said steers were fed corn for two and one-half months in the fall of 1880, whereby your option under the same, as to the time of receiving said steers, expired on October 1st, 1881.

"'I hold myself in readiness to deliver said steers after weighing to you at Dawsonville, Mo., in such numbers as you may desire, pursuant to the terms of said contract, after payment being made to me of the interest the weights may prove I have in the same, together with the advanced freights thereon.

"'Said weights will be made at Fairview, Nodaway county, Mo., and on my farm, on section 5, township 65, of range 38, in Atchison county, Mo.

"JOHN S. BILBY.

"'FAIRVIEW, NODAWAY CO., MO., Oct. 25th, 1881.'

"This was served at Council Bluffs, Ia., on both Teal and Coleman on the 28th of October, '81, by copy, by Jno. A. Wishard.

"That in pursuance of said notice, at Fairview, and on said 1st day of November, 1881, defendant weighed said cattle, amounting to 1,243 head, and that said 1,243 cattle weighed one million five hundred and fifty-three thousand three hundred and five pounds. The plaintiffs did not appear at said place to receive said cattle or comply with the terms of said notice.

"That thereupon said cattle were turned into stock pasture fields, and full fed until December 1st, 1881, on

corn, and that the value of said corn so fed to them during that time was $9.420.

"That on the 15th day of November defendant received written notice from plaintiffs, demanding the cattle under written contract of November 3d, 1880, to be weighed and delivered at Dawsonville December 1st, 1881.

"Said notice was in words and figures as follows:

"'To JOHN S. BILBY:

"'You are hereby notified that we will be ready to receive from you on the 1st day of December, 1881, the cattle, consisting of fifteen hundred head of steers, belonging to us, and placed in your keeping under a written contract, dated November 3d, 1880, and we hereby notify you that on said 1st day of December, 1881, we will demand said fifteen hundred head of steers at your hands. TEAL & CO.

"November 15th, 1881.'

"That in pursuance of said notice defendant commenced to weigh 1,240 of said cattle on the 1st and 2d days of December, 1881, and that said 1,240 cattle weighed at that time and place one million five hundred and eighty-four thousand one hundred and sixty-four pounds.

"Defendant introduced testimony further tending to prove that plaintiffs disturbed said cattle by building a fire near the pens where the cattle were held on the nights of November 30th and December 1st, 1881, just prior to the days when said cattle were to be weighed, and that by reason of such disturbance the weight of said cattle *at* the same were weighed on said first and second days of December was reduced 25 to 50 pounds per head.

"Defendant further introduced testimony tending to prove that said cattle were shrunk before weighing, according to the terms of said written contract, and that

after the same were weighed he offered to deliver them over to plaintiffs on payment in cash by plaintiffs of five cents per pound for all extra weight over and above nine hundred and fifty pounds per head, according to said weights of November 1st, 1881, and on the payment for the care and feed for the same from that time to Decem- 1st, 1881, and for the freights defendant had paid on said cattle from Council Bluffs, which payment plaintiffs refused to make, and demanded said cattle to the number of fifteen hundred head.

"Defendant introduced evidence tending to prove that of the two hundred and sixty-eight cattle that died, defendant took off and preserved the hides of all of them, except seventeen. That defendant offered to take off the hides of these, they being frozen. Plaintiff Coleman expressly stipulated that defendant need not take off their hides; that he knew they were dead, and that was all he wanted; and that on March, 1881, plaintiff Coleman agreed to count and receive the hides defendant had taken off the cattle, he then stating he wished to market them; and defendant got them together for that purpose, but plaintiff afterwards refused and neglected so to do. That defendant had two hundred and fifty-one (251) hides on his farm ready for counting, inspection and receiving by plaintiffs. That again, in April, 1881, defendant tendered these hides to plaintiff Coleman, and requested him to count, inspect and receive them, which he refused to do. That during the summer of 1881 these hides rotted and became spoiled without any fault on the part of the plaintiff.

"Defendant further introduced evidence tending to show that the market value of said cattle at Dawsonville on the first days of December, 1881, was three and a half cents per pound to four cents per pound, and that the difference in value between the cattle at Dawsonville,

Mo., on said first day of December, 1881, which he had weighed and ready for delivery, and the same cattle weighing 1,400 pounds, would not exceed fifty cents per hundred pounds.

"The defendant introduced evidence tending to show that there was a market for cattle at Dawsonville, Missouri; that the surrounding country for many miles was very productive and well inhabited, and a large portion of the population was devoting their time to the raising af cattle. That there were a number of cattle buyers at that place, and that the value of beef cattle at that place was the Chicago market price for the same kind of cattle, less freight and the ordinary shrinkage of cattle between those places, occasioned by their shipment. That in the summer of 1881 there was a large demand there for such cattle as those replevined by the plaintiffs from the defendant, for the reason that with the exception of a few of the cattle which were described in the testimony of the witnesses as 'stuck cattle' the others were in a fine condition to be taken and fed for fatted beef cattle. And that the cattle dealers in and around Dawsonville in that season of the year were buying cattle in Chicago and other markets and shipping them to Dawsonville for the purpose of selling them to parties in the surrounding country as feeders; that is to say, to be fed until they become fat beef cattle. That such cattle as those replevined by the plaintiffs would, at that season of the year, have brought more at Dawsonville, and could have been sold to a greater advantage to the cattlemen in the surrounding country than they were afterwards sold in Chicago.

"Defendant also introduced evidence tending to show that the cattle were recklessly handled by the plaintiffs after they were delivered into their possession by the marshal.

"That the commission men in Chicago who handled

the cattle did not sell them to the best advantage, and that such cattle would have realized much more if they had been disposed of differently by the plaintiffs and their agents.

"Defendant introduced evidence tending to show that when he drove the cattle to Dawsonville, Missouri, he demanded of the plaintiffs that they pay him for the food and care of the cattle while in his hands, and they refused to allow him anything whatever at that time or at any time.

"Defendant introduced evidence tending to show that the plaintiffs' cattle, when delivered to him at Dawsonville, Missouri, in 1880, were of the value of $25; that at the time they were taken from the defendant at said place by the marshal they were at least of the value of $44 64-100 dollars per head; that between the 1st of November, 1881, and the first of December, 1881, they ate 18,480 bushels of corn; that corn was worth between the last said dates, at plaintiffs' premises, between forty and fifty-eight cents per bushel, That plaintiffs' cattle increased in weight between the last said dates 15 and ½ pounds each.

"Defendant also introduced evidence tending to show that plaintiffs' cattle, while in his care, had eaten a great quantity of hay and straw, and during the summer and fall of 1881 had consumed the grass and pasture off of several thousand acres of land, and that at all times while in his custody, they were herded, guarded and fed by men employed by him, to the number averaging between twenty-five and forty.

"Defendant further introduced evidence tending to prove that plaintiffs knew of the manner in which said cattle were handled while they were at Rock Creek station and vicinity in the month of October, 1880, and of the want of feed and water they had suffered from at

that place, and the kind of water they had drunk at Rock Creek Valley and Soda Lakes, and of the severe, stormy and extreme cold weather prevailing there at that time, and of the death of a portion of said cattle from such exposure, want of care and food, and bad water while in that vicinity, and of the delays in shipment of said cattle; and that defendant and said Bass were not informed by plaintiffs of any of said facts, or that defendant or said Bass knew anything thereof at the time defendant received said cattle under said contract, and that defendant at the time he received said cattle supposed they were of an average lot in age, flesh, and quality to the portion of said Teal & Co.'s herd which arrived at Council Bluffs on the 17th day of October, 1880; that the cattle of the sample lot received Oct. 17th, 1880, weighed on an average one thousand and one pounds, and that the thirteen hundred head received by defendant under his contract weighed 1,250,390 pounds, an average of 950 pounds and a fraction, and that the two hundred head of said cattle, weighed to defendant with the 1,000 head, weighed 174,650 pounds, an average of 837 pounds and a fraction.

"Defendant further introduced evidence tending to prove that while defendant had said cattle at Dawsonville ready for delivery to plaintiffs from the 2d to the 7th days of December, 1881, the defendant expended two hundred dollars for feeding said cattle, and that defendant had said cattle fed and watered regularly.

"Defendant introduced evidence tending to prove that he paid railroad freight on said 1,500 cattle from Councill Bluffs, Iowa, to Dawsonville, Missouri, at different times from November 4th, 1880, to the amount of $1,169.50.

"Defendant introduced evidence tending to prove

that none of the 1,500 cattle received by him from plaintiffs were lost, stolen or strayed.

"Defendant also introduced evidence tending to prove that prior to the 1st day of December, 1881, that the plaintiffs had entered into an agreement with Wood Bros., cattle commission merchants, of Chicago, Ill., to turn said cattle over to them upon their, the said Wood Bros., furnishing a replevin bond to enable the plaintiffs to replevy said cattle at Dawsonville, and that said cattle when replevined at Dawsonville were then and there turned over to an agent of Wood Bros., who was there for the purpose of receiving them, and that thereafter the plaintiffs had no control over said cattle or their sale.

"Defendant then offered evidence tending to prove that his reputation for truth and veracity and fair dealing in the neighborhood where he lived, and also where he was known was good, and that the witnesses so testifying would believe him under oath in a matter in which he had a pecuniary interest, and that defendant was an honest man and not a rascal."

See Record 51, pp. 26 to 36 and 37.
See Record 52, pp. 30 to 40 and 41.

The Court's charge to the jury was as follows. [The parts of the charge in italics include every part of the charge excepted to and assigned as error]:

"Let us, in the first place, bring before our mind the several parties plaintiffs and defendant to the suits. We find from the testimony in the cases that four gentlemen, Teal, Coleman, Todd and Storrs, residing in the State of Oregon, in the spring of 1880, formed a co-partnership for the purpose of driving about 3,000 head of cattle, which they owned, eastward, to dispose of them in such a manner as to them seemed best. The partner, Teal, seems to have kept in person and through his son a

general supervision of these cattle, besides conducting the financial concerns of the company. The partner. Storrs, took but little personal interest, while the partners, Coleman and Todd, had the actual control and handling of the cattle from the time they left Oregon until they arrived at Rock Creek, on the Union Pacific railroad, in Wyoming Territory, from which place they were transported by rail to Council Bluffs. The monied interest which the several partners had in the venture were, Teal, one-third; Coleman, one-third; and the two partners, Todd and Storrs, one-third jointly. The partners, it appears, were buyers, drivers, and dealers in cattle.

"On the other hand, we have Bilby, residing near Fairview, in Nodaway county, in the State of Missouri. He is a farmer on a large scale, a raiser, feeder, and dealer in stock, a merchant, and having ample means to carry out the agreement he entered into with Teal & Co. These parties, plaintiffs and defendant, on the 3rd day of November, 1880, entered into the written contract agreement in evidence. The object of this agreement, so far as it can be gathered from its terms, seems to have been, on the part of Teal & Co., to have 1,500 of the cattle driven from Oregon to Rock Creek and shipped to Council Bluffs, taken care of and fed during the winter of 1880 and 1881, and the summer and fall following, in such a manner as to secure an average weight of 1,400 pounds each, in case they were left with Bilby up to the 1st of December, 1881. Bilby, on his part, seems to have entered into the contract for the purpose of realizing a reward of five cents per pound for every pound of flesh he put upon the cattle by feeding them. The parties to the contract are brought together by Bass, a partner of the cattle firm of Rosenbaum, Bass & Co., at Council Bluffs, Iowa, and a preliminary agreement is

entered into by Bilby with the son of Teal, providing that Bilby should take 1,500 of the cattle driven to Rock Creek, such cattle to be 'similar' in age, flesh, and quality to a train load that arrived at Council Bluffs, Iowa, Sunday, October the 17th, 1880. Mr. Bass, of the firm of Rosenbaum, Bass & Co., is made the judge of the cattle, whether or not they are an average lot with the train load that arrived on Sunday, October 17th, 1880. If the quotation here made from the contract was not fully agreed on between Bilby and the son of Teal, it resulted in what is now found to be the contract in suit. Bilby had seen the cattle which were to be the sample lot.

"After this preliminary understanding between the son of Teal and Bilby the son proceeds to Rock Creek, and on the 3rd day of November, 1880, Teal, Senior, and Bilby meet at Council Bluffs and the contract in evidence is agreed on and signed by the parties. On the same evening, or the next day, 1,300 of 1,500 head of the Bilby cattle passed on by Bass were weighed and shipped from Council Bluffs to Dawsonville, Bilby going with one of the shipments. Under the contract the cattle are 'to be delivered to John S. Bilby, at Dawsonville, Missouri.' And it is further agreed that 'if the said John S. Bilby shall pay the freight on said cattle from Council Bluffs to Dawsonville, Missouri, he shall be allowed ten per cent interest on said amount and the amount to be paid on delivery of cattle to J. Teal & Co.' *The cattle, as they arrived at Dawsonville, were unloaded, taken care of, and driven to the farm of Bilby, as testified to.*

VI. Assigned Error.

"During the winter of 1880 and the summer and winter of 1881, Coleman, one of the partners, is found more or less with the cattle. The written contract between Teal and Bilby provides that Bilby 'agrees to take these cattle and winter them well on hay, straw, and

stock fields until grass comes; to be kept in enclosed pastures on good grass until the 15th of August, 1881, after which date on each and every day they shall be fed all the corn they will eat until delivered to J. Teal & Co.' It is claimed by Bilby that in the first half of December, 1880, the stipulations and conditions of the contract last quoted, were, by verbal agreement between himself and Coleman, so changed that the cattle were to be fed of corn during the winter of 1880 and 1881, and that in consideration of Bilby's doing so he was to be released from the stipulated weight of 1,400 pounds, and as a further consideration that the time which he so fed corn in the winter of 1880 and 1881 was to be deducted from the time which Teal & Co. may leave the cattle to be fed, namely, the first of December, 1881. Under the contract Teal & Co. agree 'to advance one thousand ($1,000) dollars to John S. Bilby on the first day of September, 1881, to be applied to payment of weights added to cattle on the last delivery.' The amount thus stipulated for was paid by Teal & Co. and one receipt endorsed on the contract which Teal had made, in addition thereto, a separate receipt given.

"A notice was served by Bilby on Coleman, notifying him that on the 31st day of October, 1881, he would proceed to weigh the cattle for the purpose of delivering them on payment of dues for care and feeding, as he, Bilby, claimed he had a right to do under the verbal contract made between himself and Coleman, modifying the written agreement. Nothing was done under this notice except the weighing on the 31st day of October, 1881, of which Teal & Co. took no notice. On the first day of December, the day fixed in the written contract for the delivery, Teal & Co. demanded their 1,500 head of cattle of Bilby, 1,229 or 1,232 of the cattle were weighed on the 1st and 2nd of December and driven to

Dawsonville, and after being held there some days by Bilby were taken by a writ of replevin issued from this Court, and the possession of them delivered to Teal & Co. on their giving bond. The matter thus got into the Court, and the action known as the replevin suit commenced. In this action, Teal & Co., as plaintiffs, allege that they are the owners of the 1,500 head of cattle in the controversy, and that Bilby wrongfully retains them, to their damage 25,000 dollars. They, Teal & Co., by Joseph Teal, one of the partners of Teal & Co., and a plaintiff in this action, makes an affidavit swearing the 1,500 cattle are worth 75,000 dollars, that they are wrongfully detained by Bilby, and that they (Teal & Co.) will be in danger of losing their said property unless it be taken out of the possession of Bilby or otherwise secured. Without such an affidavit Bilby could not have been deprived of the possession of the cattle. To this action Bilby appears and answers that Teal & Co. are not entitled to the possession of the cattle; that the same were delivered to him by Teal & Co. to be fed and cared for; that 268 of the cattle died without any fault or negligence on his part; that he continued to feed and care for the rest until the same were taken from him by virtue of the replevin suit. That he is entitled to 30,000 dollars for feed and care of the cattle, except 1,000 dollars paid; that he is entitled for monies laid out for freights paid, and asks judgment for damages, money laid out and a return of the cattle. *In this action (replevin) the question is, who is entitled to the possession of the cattle? The ownership not being disputed, the solution of this question depends on another, and that is, was there anything due to Bilby on account of feeding and care of the cattle and the money charged to have been expended? If not, then plaintiffs, Teal & Co., are entitled to a verdict and such damages as they have sustained,*

XI. Assigned Error.

under the evidence, by the detention of the cattle from them after the first day of December, 1881, and until they are delivered to them by the U. S. marshal. If, on the other hand, Bilby is entitled to pay for feed and care of the cattle they must be returned to him, and he (Bilby) is entitled to the damage he has sustained in consequence of the cattle being taken out of his possession, namely, the trouble and expenses for feeding and caring for them at Dawsonville, as herinafter further explained. Your allowing of damages in the replevin suit, if you find the issue therein for Bilby is limited as stated, and you cannot allow general damages for the feeding and caring for the cattle; such damages, if any, you are authorized to pass on in the second suit between the same parties and growing out of the same contract, to which your attention will now be called.

"In this, the 2nd suit, the plaintiffs allege that they were the owners of 1,500 cattle, and that, being desirous of having said cattle properly cared for during the winter, spring and summer of 1880 and 1881, they entered into a contract in writing with Bilby to keep the same for them; that they weighed the cattle to him, and he received them; that the average weight thereof was 950 pounds; that they paid Bilby $1,000 on the first day of August, 1881, as agreed on, and that plaintiffs have fully kept their part of the contract. The plaintiffs in their suit further aver that if said cattle had been well kept, as provided in the contract, up till the first day of December, 1881, they would have increased in weight on an average 450 pounds per head, and that Bilby had agreed to so feed them that they would come up to this average, and that they would have been worth 98 dollars per head to the plaintiffs. They next proceed to state that Bilby failed to keep the cattle as agreed, and that on the 1st day of December he refused, on plaintiffs'

demand, to deliver them up, and they have been compelled to bring the replevin suit; that the increased weight of the cattle taken from the defendant average three hundred and twenty-six pounds, and that the cattle were worth forty-four dollars per head only. Plaintiffs further allege that Bilby failed to deliver 271 head of the 1,500 head of cattle delivered to him, and that the cattle not delivered were worth twenty-six thousand dollars. Teal & Co. claim that they have been damaged by Bilby not keeping his contract in the sum of 92,366 dollars, for which they ask judgment against Bilby.

"The petition of plaintiffs in the suit sets out more at length and in detail the various failures of Bilby to keep his contract, and you may refer to it for omitted specifications; so many of them have been cited only as will enable me to intelligently speak of their claims.

"To this action the defendant Bilby answers, by first denying all the allegations of the plaintiffs' petition, and he next proceeds to declare the facts to be, that he entered into the contract for the keeping of the 1,500 cattle of plaintiffs; that the cattle were to be similar in age, flesh, and quality to those which arrived on the 17th day of October, 1880, which Bilby had examined; that he, Bilby, relied on the representations as to the conditions of the cattle made by the plaintiffs, and was thus induced to enter into the contract, and agree that Bass, a partner of the cattle firm of Rosenbaum, Bass & Co. at Council Bluffs, should be the judge as to whether the cattle to be turned over to him were up to an average as compared with the sample lot; that the cattle delivered were not in fact up to the average, though so represented to be by plaintiffs and said Bass; that the cattle had been snowed in and detained at Rock Creek, from the 17th to the 30th of October, that they had been starved until many of them died, and others so frozen and injured

that they never fully recovered, of which facts as stated the defendant and Bass were ignorant, and were concealed by plaintiffs from defendant and said Bass; that the treatment the cattle received was the cause of many of them afterwards dying; that though they were carefully shipped, handled, and cared for, two hundred and sixty-eight of them died, and none of them strayed or were stolen, and none died through the neglect or carelessness of defendant, but that they died from unavoidable causes. Defendant Bilby further alleges that he complied with the contract regarding the preservation of the hides as evidence of the death of such of the cattle as had died, and that he tendered the hides as agreed between plaintiff Coleman, and that since the hides had spoiled. Defendant next set out the amounts of money advanced by him for plaintiffs to pay freight of cattle to Dawsonville, and claims payment thereof with interest.

"Defendant next proceeds to set up a verbal agreement that the defendant should put the cattle on corn, and that in consideration of so doing the time the defendant should so feed was to be deducted from the time the cattle were to be fed corn in the fall, and as a further consideration the defendant was to be released from the written contract to increase the weight of the cattle 450 pounds. The defendant next alleges that in conformity to the verbal agreement he put the cattle upon corn 75 days, and that on the 27th of September he notified plaintiffs that their cattle were ready for delivery, to which plaintiffs paid no attention, and that in conformity to the notice he weighed the cattle, and that they weighed 1,553,305 pounds; that on the 15th day of November, 1881, defendant received notice from plaintiffs that on the 1st day of December, 1881, they would be ready to receive the 1,500 head of cattle belonging to them; that thereupon defendant made arrangements for weighing

and delivering of said cattle; that while doing so plaintiffs caused the cattle to be disturbed, to his (defendant's) injury, in the sum of 2,245 dollars. The defendant next proceeds to state that he had 1,232 head of cattle on the 2nd day of December, 1881, at Dawsonville, ready for delivery, and willing to deliver the same on payment of the amount due him for caring and feeding of said cattle, the amounts advanced for freights, and the injury done him by disturbing the cattle before weighing, amounting in all to $29,136.62. Defendant further states that plaintiffs refused to pay him his just demands and receive the cattle, and that, in consequence, the cattle were kept at Dawsonville up to the 9th day of December, 1881, when they were taken out of his possession by the U. S. Marshal under a writ from this Court and delivered into the possession of plaintiffs.

"With the outlines of the allegations of plaintiffs in their suit for damages, and the outlines of defendant's answer thereto and his allegations as to the modification of the written contract by verbal agreement before us, we can enter upon the consideration of the law as applicable to the facts, which I shall now proceed to do.

"And, first, of the written contract. It has already been said that its object, as deducted from its provisions, must be declared to have been the taking care of and feeding of the cattle, so as to increase their weight from 950 pounds to 1,400 pounds per head; in other words, add 450 pounds, as provided in the written contract. The plaintiffs, in their statement of the case, say that the increase of weight spoken [of] was for the purpose of making them marketable, and that in consequence of their not being marketable at 1,276 pounds, losses, aside from the deficiency in weight, has been incurred by them. The contract is silent as to what was to be done with the cattle after they were fed,

and hence the alleged intended manner of dealing with—by the plaintiffs can have no bearing in the matter. You may well come to the conclusion from the evidence that the plaintiffs, if they had received the cattle in the order anticipated, they would have dealt with them as their interests would have suggested, put them on the market for beef, in whole or in part, or still further fed them.

"The existing market, its future prospect as to rise or fall, the cost of longer feeding them, might all have constituted factors in their determination as to what they would have done with the cattle. Enough; the contract says nothing about the future of the cattle, and it would be idle for you to speculate about it. The written contract provides that Bilby's cattle were, on an average, to be similar to a lot of the Teal herd, which had arrived on the railroad on the 17th day of October, in age, flesh, and quality; and Bass, a member of the cattle firm of Rosenbaum, Bass & Co., which firm handled the Teal cattle on commission, was made the judge as to whether the cattle of Bilby's came up to the average of the sample lot. It may have been unfortunate on the part of Bilby to have agreed to an arbitrator who was in the interest of Teal, by way of commission in the cattle on which he was to pass; yet that was for Bilby to determine, and he cannot complain of the acts of Bass, if honestly discharged by him. It is only in case Bass was himself deceived by plaintiffs, in not putting him, Bass, in full possession of the knowledge possessed by them, and necessary for proper discharge of his, Bass', duties as arbitrator, that you can go behind Bass' acts. Then, if the cattle of the Teal herd were infected by a disease incurred through careless handling, want of sufficient or proper food or water, and such disease could not be discovered by a careful examination, which Bass is presumed to have made, in such a case the plaintiffs were bound,

if they knew of such disease, to disclose it to Bass or Bilby, and their failure to do so was a fraud upon Bilby; and if damages have resulted to him, Bilby, in consequence, he is entitled to recover them in this action. Bass, under the contract, was to judge of the age, flesh and quality of the cattle between the parties, as already stated, but he was not made the judge as to the manner in which the cattle were to be weighed, that being stipulated for in the written contract. Under it the cattle arriving before noon of any one day were to be cut off from food; in other words, put upon shrinkage the same day in the evening at 7 o'clock, and remain without food or water until 7 o'clock the following morning, when they were to be weighed. Cattle arriving after noon of any one day are to be cut off from food and water on the evening of the following day. It is apparent from these provisions of the written contract that the cattle were not to remain in the stock yards on feed longer than was necessary to put them upon shrinkage, as stipulated. The provisions here cited Bass, who had the handling of the cattle, had not a right to change. He had nothing to do with them, except to see that they were complied with. If the cattle were kept in the stock yards on food longer than necessary to put them upon shrinkage, or if the cattle were not cut off from food or water, as provided in the contract, and this occurred without the knowledge and consent of Bilby, and he, Bilby, was damaged in consequence thereof, he is entitled to recover such damage in this action as he has shown by the evidence he has suffered. Bilby could waive the conditions as to feeding before weighing the cattle, or not insist on them; and if he knew that the contract was violated in this respect, you may infer such waiver if he failed to protest. Bilby had a right to presume that Bass would do his duty in the premises, and was not bound to see to it that he,

Bass, did as required by the contract. It is only from Bilby's knowing the violation and not objecting that the inference of waiver spoken of can be drawn.

XII. Assigned Error.

"*The written contract provides 'that Bilby shall take the cattle and winter them well on hay, straw and stalk fields until grass comes; to keep in enclosed pastures, on good grass, until the 15th day of August, 1881, after which date on each and every day they shall be fed all the corn they will eat until delivered to J. Teal & Co.' The provisions as to wintering them well on hay, straw and stock fields will receive at your hands a reasonable construction. They are meant to convey the idea that the cattle should have a reasonable quantity of one or the other of the kind of food mentioned, so as to enable them to pass through the winter in reasonable good condition. Bilby was not thereby prevented from feeding them on grass, dry or green, corn even, or partly substitute such food for the food named in the contract, so that the object, the keeping of the cattle in reasonably good order, was secured. It will not do to stick in the bark in expounding the contract, for if you did, what would have become of these cattle? There are no provisions in the contract for watering them. Yet no one has contended that they were not to be watered. It belongs to the keeping and caring for them.* The cattle are to be kept on good grass, in enclosed pastures. The object of the latter provision, no doubt, was to keep the cattle from running at large. It is for you to say whether the herding of a portion of them on open prairie a part of the time, when such prairie is found to be fenced all around, except the road openings, is a compliance with the provisions of the contract.

XI. Assigned Error.

"Another provision of the contract is 'that Bilby is to be responsible for all cattle lost, strayed or stolen; and for any dying through the neglect and carelessness of

the said John S. Bilby, any dying through causes which are unavoidable, shall be shared thus: 'J. Teal & Co. to bear the loss of the steers, and John S. Bilby the feed. If any steer die, John S. Bilby shall preserve the hide as evidence of death, and the ears, if there are any ear-marks.' I remember no evidence of any cattle having strayed or having been stolen. If there is evidence of any of the cattle having been lost, strayed or stolen, without having been recovered, Bilby is liable for such to the plaintiffs.

"Of the missing or lost ones, if any, I shall speak further hereafter. If any cattle die through unavoidable causes, plaintiff to lose the steer and Bilby the feed. What are unavoidable causes? They may [be] said to be the incidents which occur over which the party has no control.

XIII. Assignment.

"*Bilby was bound to take reasonable care of the cattle with reference to the condition in which he took them. What is reasonable care under the circumstances testified to, you are the judge of. If he did not take such reasonable care, and any of the cattle died in consequence, he is responsible for them to the plaintiffs. It was suggested in argument and shown that more or less of Bilby's cattle were running with and were taken care of the same as the Teal cattle. This testimony must be considered with reference to the condition of the cattle. Strong cattle may get along with and do well with treatment under which weaker would suffer. The distinction here drawn had special application to the watering of some of the cattle.*

"*Bilby, under the written contract, was to preserve the hides of the cattle which died and the ears of any which had ear-marks. Under this provision Bilby was bound to preserve the hides of all the cattle which died; and unless he has done so, he is bound to account for the whole of the 1,500 cattle, less such as he has preserved the hides of, or the preservation of them was agreed to be waived.*

VIII. Assignment.

"There is testimony showing the number of hides preserved by Bilby, and as to an agreement with plaintiff Coleman waiving the preserving of some of them. If the whole of the steers which are claimed to have died have been accounted for to your satisfaction, Bilby cannot be held responsible, provided they all died through unavoidable causes, and not through the neglect or carelessness of Bilby, as already instructed. The offer to count the hides claimed by Bilby to have been made to Coleman, if made as claimed, and the count actually made, as testified to, if satisfactorily proven, may be taken by you as showing that Bilby had the number of hides claimed. There are no provisions in the contract where the hides of cattle which had died should be counted, and the reasonable construction thereupon is that the hides preserved should be counted at the time, and with a view of making the hides themselves available for use or sale.

We have thus passed over the written contract between the parties. Such portions as have not been considered will be touched upon in the examination of the claimed verbal agreement, by which the written contract is alleged to have been modified. This modification is set up by Bilby, and he is bound to prove it. The written contract speaks for itself, and must prevail, unless a change and modification of its terms are proven to your satisfaction. In attempting to arrive at a satisfactory conclusion regarding the modification or change of the written contract a natural inquiry is: Was there a reason or necessity for the change? The parties alike interested in the preserving of cattle were upon the ground. The cattle were dying in large numbers from some cause. Would a change of food suggest itself to meet the contingencies? If so, there would be a reason and motive for the change. *A contract is claimed by Bilby to have been made changing some feature of the existing written*

IX. Assignment.

contract. Bilby affirms that change. Coleman denies it. An unimpeached witness is called by Bilby at the time of the claimed making of the change, to whom he, Bilby, repeats the agreement in the presence of Coleman, and the witness testifies to the change in court. A number of the witnesses testify that the cattle were put on corn about the time of the claimed change. The rest of the testimony bearing on the question consists of acts and admissions claimed as made by the parties to the modification, and is for and against the change. From the testimony pertaining to it you must determine, first, whether there was any change; and if you find that a change was made, what that change was. If you find that there was no modification or change, then the written contract remained in full force. If you find there was a modification or change of the written contract by verbal agreement as claimed by Bilby, in that case you will proceed to inquire what was done under it. And here the question arises, Did Bilby live up to the change or modification, if it was made? Though you may find that a modification of the written contract was made by verbal agreement, as claimed by Bilby, yet if he, Bilby, did not live up to and comply with the change made, he cannot have the benefit of it. You will observe that the change in the written contract, if made, brings up the question whether Bilby shall be paid for the care and expenses of feeding the cattle from the time of weighing them, under the notice given to Coleman, or shall he be satisfied with the additional weight put upon the cattle afterwards, as shown by the December weight. It is obvious from the testimony that the additional weight put upon the cattle between the two weighings did not pay the expenses the cattle caused. If, under the new agreement, the plaintiffs were bound to take the cattle at the time of notice and first weighing, in that case

Bilby will be entitled to the expenses of feeding them after the first weighing in December, deducting therefrom the value of the increased weight between the weighings.

"Regarding the attempt to impeach the character of Bilby for truth, veracity, honesty, and fair dealing, it may be remarked that plaintiffs had the right to show that Bilby, who testified in the case, could not be believed on oath. It is usual when such attempts are made to stop here; but plaintiffs went further, and undertook to show also that he, Bilby, is dishonest. How he, Bilby, met these charges you heard, and are able to determine the question whether his testimony shall be affected thereby. While this far everything is legitimate and proper, there is one view against which I warn you. This view is that the attempt to attack the honesty of Bilby should not be allowed to affect your mind, if at all, further than as related to this case. *A man suing another must have a good cause of action. He cannot turn around and say that I have no cause of action, yet you are a rascal, and therefore I am entitled to receive a judgment, and take your property to satisfy it. What is intended by this allusion to the attempt to impeach is to direct your mind to the proper application of the testimony.*

X. Assignment.

"Having thus reviewed the law as applicable to the testimony at some length, what remains to be done is to present to you the theories and claims of the parties in each of the cases. Both suits, the replevin suit instituted on the first of December, 1881, and the suit upon the contract for damages brought on the 23rd of December, 1881, are suits in which Teal & Co. are plaintiffs and John S. Bilby is the defendant. In the first of these suits, the action of the replevin, the plaintiffs seek to recover the possession of the 1,500 head of cattle

which they delivered to Bilby for the purpose of feeding. There is no dispute as to the title of the cattle, they belonging to Teal & Co.

"Bilby claims the possession as rightfully belonging to him until he is paid for the care and expenses he has been at in feeding and caring for the cattle. The claim made by defendant is denied by plaintiffs, they virtually saying you, the defendant, have no such rightful claim, but under the pretense of it wrongfully withhold the possession of the cattle from us. *Now, if you shall find from the testimony, and under the instructions of the Court, that defendant, in caring for and feeding the cattle as he did, damaged them in value rather than increased it, you should find the issue in the first, the replevin suit, for the plaintiffs, and assess damages in their (pl'ffs') favor sufficient to cover losses incurred by being deprived of the cattle from the first of December up to the time they (pl'ffs) obtained the possession of them under the writ of replevin.*

XIV. Assignment.

"*But if, on the other hand, you shall find from the testimony, and under the instructions as given by the Court that defendant Bilby was entitled to something for the care and feeding of the cattle as he did, after allowing and deducting therefrom any damages which plaintiffs may have sustained, in that case you are instructed to find the issue in the replevin case for the defendant, and assess his damages in amount sufficient to recompense him for his trouble, care, and cost of feeding and holding them at Dawsonville from the 2nd day of December up to the time they were taken out of his (def't's) possession by virtue of the replevin.*

XV. Assignment.

"*In the replevin suit you can only determine whether the plaintiffs or defendant is entitled to the possession of the cattle and the damages as stated. The determination of the amount of damages sustained by one or the other of*

the parties as to the treatment and caring for the cattle is the subject-matter of the controversy in the second suit, the suit for damages on the contract.

"The allegations and claims of plaintiffs in the second suit—the suit on the contract for damages—summarized are that the plaintiffs have performed all the agreements and undertakings of the contract on their part, but that the defendant has failed to keep and perform his part, whereby plaintiffs have been damaged in the sum of 92,366 dollars.

"To this second, the damage suit on the contract, the defendant answers, summarized, alleges that the written contract as originally made was afterwards, by a verbal agreement, modified and changed, and that he has performed all his agreements and understandings under the contract modified; that he is entitled to compensation for the care and feeding of the cattle and to monies laid out and expended for plaintiffs for freight, and asks for a judgment in the sum of $51,981.62.

"It remains for me to instruct you regarding the rule for assessing damages. Much has been properly said about weights of cattle because it helps us in arriving at the value of the cattle, for that is the real question. The price per pound of cattle of various weights and in different conditions has been considered, because this may aid us also in arriving at the true value of the cattle. Under the claims made by the plaintiffs, and assuming that the written contract under which they claim has not been modified, they would be entitled to the difference in value between the cattle weighing on an average 1,400 pounds and cattle weighing on an average 1,276 pounds, if there be any difference in value. The defendant Bilby would also be liable for the number of cattle not properly accounted for, valued at the value of a 1,400 pound steer. Whatever value you fix on the cattle must be fixed with refer-

ence to the value of cattle then on the 1st day of December, 1881, at Dawsonville. Under the written contract the plaintiffs are entitled to the hides of the cattle which unavoidably died. Unless you find that a tender of these was made by defendant to plaintiffs, in which latter case the defendant would not be liable for them, there is no proof before you as to the value of the hides, and in order to recover their value the plaintiffs would have to show it; the hides seem to be out of question even if defendant's tender was invalid. The foregoing is the claim of the plaintiffs for damages, and they will be ascertained by you under the evidence and the instructions of the court as given you in the manner stated, if the written contract has not been changed or modified.

"The claims of the defendant are as follows:

"Assuming the written contract to have been modified, and that defendant performed his contract as modified, he claims for the increased weight of the cattle from 950 to 1,276 pounds. He further claims that under the modified contract he had a right to turn over the cattle on the first day of October or earlier, and asks pay for feeding and caring for the cattle from the first day of October, when he tendered them, to the first day of December, when he drove them to Dawsonville, deducting therefrom the value of the increased weight between the two weighings. He also claims for money advanced for and on account of freight charges advanced on the cattle, with interest at 10 per cent. from the date of payment. If you find any amount due from plaintiffs to defendant, defendant is entitled to interest for the amount you may find due him from the the time the possession of the cattle were taken from him to this day at six per cent.

"You will have to find a verdict in each of the cases. The forms of the verdict will be prepared and handed to you to fill them up in conformity to your findings.

XVI. Assignment.

"*I desire to modify the instruction regarding your finding, and now instruct you that in case you find the issue in the replevin suit for the defendant, you should at the same time find the value of the cattle taken by Teal & Co. from the defendant Bilby, and also the amount of the interest the defendant has in the cattle.* You are further instructed that if you find the issue in 409—the damage suit—for the defendant, you will merely say so in your verdict."

The jury returned two verdicts on January 2nd, 1882.

The one in the replevin suit, No. 51, was as follows:

"We, the jury, find the issues for the defendant, and assess the value of the property taken at $65,598.35, and assess the defendant's interest therein at $23,835.12."

And the verdict in the damage case, No. 52, was:

"We, the jury, find the issues for the defendant."

Judgment was thereupon entered in favor of defendant against the plaintiffs and their sureties on the replevin bond for $23,835.12, the defendant's interest in the cattle for keeping and for advances.

The Sections of the Revised Statutes of Missouri, authorizing the verdict and judgment, are as follows:

"SEC. 3854. If the plaintiff fail to prosecute his action with effect and without delay, and shall have the property in his possession, and the defendant in his answer claims the same and demands a return thereof, the Court or jury may assess the value of the property taken, and the damages for taking and detaining the same, for the time such property was taken or detained from the defendant until the day of the trial of the cause.

"SEC. 3855. In such case the judgment shall be against the plaintiff and his securities, that he return the property taken, or pay the value so assessed, at the

election of the defendant, and, also, pay the damages assessed for the taking and detention of the property and the costs of the suit.

"SEC. 3856. If the plaintiff have not the property in possession, damages shall be assessed as directed in section three thousand eight hundred and fifty-four, for the taking or detention, or both, as the case may be, of the property; and judgment shall be rendered against the plaintiff and his securities for the damages, if any, and for costs of suit."

Aside from defendant's lien at common law, resulting from his possession of the cattle, there was a Statute of Missouri in force at the times in question, the material parts of which are as follows:

SEC. 3196, R. S. "Every person who shall keep, board or train any horse, mule or other animal, shall, for the amount due therefor, have lien on such animal, and on any vehicle, harness or equipment coming into his possession therewith; and no owner or claimant shall have a right to take any such property out of the custody of the person having such a lien, except with his consent, or on payment of such debt; and such a lien shall be valid against said property in the possession of any person receiving or purchasing it with notice of such claim."

Motion for new trial was made in each case, and after consideration by the Court overruled. The motion for new trial in the replevin suit, No. 51, among other grounds set out that the verdict was excessive, referring to the finding as to defendant's interest in the cattle.

The plaintiffs here assign 17 errors. See plaintiffs' brief, pp. 16 to 24.

The first five, No. 1 to 5 inclusive, are to the refusal

of the Court to give instructions asked, respectively numbered 1, 2, 9, 13 and 14.

The next eleven assignments, No. 6 to 16 inclusive, are to certain parts of the charge of the Court specifically set out in the assignments.

As to assignment No. 7 to a part of the charge it cannot be considered because that part of the charge was not excepted to at the trial.

See Record 51, pp. 54 to 61, and Record 52, pp. 59 to 66.

The assignment No. 17 is to the refusal of the Court to permit a deposition to be read and other evidence as to the sale of the cattle by plaintiffs at market value at Chicago 5 or 6 days after they were replevied [see record 51, p. 26]; but the contents of the deposition are not set out in the record.

In paragraph 9, pages 44 and 45 of the plaintiffs' argument, exception is taken to a portion of the charge of the Court, which is not included in any of the assignments of error, and of course cannot be considered.

The verdict and judgment in amount was approximately what was conceded by the plaintiffs to be due the defendant for caring for and feeding the cattle and for advances with interest from the time they were replevied, if there was nothing due the plaintiffs from the defendant for damages sustained by reason of the defendant's alleged violation of the contract under which he held the cattle, though the defendant claimed his interest was much larger in amount, and the testimony tended to support that claim.

An allowance of an average increase of 326 pounds per head on 1229 cattle, which was conceded by the plaintiffs, at five cents per pound, with interest thereon from the time of replevin to the time of trial, would alone

amount to $21,285, and the defendant's undisputed advances with interest to the trial amounted to $1,395, making $22,680, being within $1,185 of the amount of the verdict, and this calculation does not allow anything for keeping the cattle from the 1st of November, or the 1st of December, 1881, when plaintiffs ought to have received them, to the 7th of the same month, when they were replevied, though defendant's testimony tended to show the value of the corn fed to them between November 1st and December 1st was $9,420.

The defendant will maintain that it is manifest from the records in these cases—

First—The question whether plaintiffs had any claim against the defendant for the alleged violation of his contract for caring for and feeding the cattle was fully, fairly and favorably for plaintiffs submitted to the jury, and the jury found that defendant was not liable, for that he had not violated but had faithfully kept and performed his contract.

Second—The defendant not having violated his contract to plaintiffs' damage, he was entitled to recover in the replevin suit his interest in the cattle represented by his claim against the cattle, for which he had a possessory lien, and his claim, or the extent of his interest in the cattle, was fairly submitted to the jury and fairly found in their verdict.

The plaintiffs' assignments of error will be specifically considered in our argument *post*.

ARGUMENT.

I.

From the foregoing statement and that of the plaintiffs the controlling issues and facts on which the cases were tried by the Court and jury are plainly manifest. The plaintiffs indisputably owned the cattle, 1,500 head of steers, delivered them in the fall of 1880 to the defendant under the written contract to be well cared for, fed and fattened to an average increased weight per head of 450 pounds, if left with defendant until December 1, 1881, and to be re-delivered to the plaintiffs, between 15th of October and December 1st, 1881, on payment to the defendant of 5 cents per pound for the increased weight and the re-payment of defendant's advances on the cattle.

The defendant kept the cattle, cared for and fed them until December 7th, 1881, when the plaintiffs replevied them without paying or offering to pay the defendant his charges for caring for and feeding them, and for advances. It is alleged in the plaintiffs' petition, and treated in the charge of the Court, as an undisputed fact that the cattle at the time they were taken out of the possession of the defendant by the writ of replevin, had increased in weight on an average of at least 326 pounds per head, and the plaintiffs' argument, par. 12, p. 48, expressly admits that adding this increased weight was worth 5 cents per pound. It is also admitted that 268 or 271 head of the cattle died while in the defendant's

charge. The claim of the plaintiffs, constituting the foundation of their two suits (the replevin and the damage), was in substance:

First—That the defendant had failed to comply with his contract to increase the weight of the cattle to 450 pounds average per head.

Second—That by defendant's violation of the contract in failing to properly care for the cattle, 271 head of the cattle had died.

Third—That by reason thereof the plaintiff owed the defendant nothing for his care of the cattle and for advances, and that on the contrary the defendant owed the plaintiffs largely for damages done the cattle by failing to add the increased weight, and by letting some of them die.

The defendant's claim broadly stated and set forth in his answer to each of the suits, was that the cattle when received by him were in fact in an unsound and unhealthy condition, and many of them in a dying condition, not known to or contemplated by him when the contract was made, and that when he subsequently ascertained their actual condition he and the plaintiffs modified the written contract by relieving him from the obligation of adding any specific average weight to the cattle, and in consideration for his feeding the cattle on better food, that is, corn instead of hay and stalks in the winter of 1880, as provided in the original contract, and further that the plaintiffs were to accept the cattle at an earlier period in 1881 than the time fixed in the written contract if the defendant desired them to do so. That the defendant fully complied with the contract as modified, that a part of the cattle died without his fault, and that he accounted or offered to account to the plaintiffs for the dead cattle by producing their hides as provided in

the contract. That he was entitled to recover of the plaintiffs for keeping and feeding the cattle and for his advances, and had a lien on the cattle for the amount due him therefor at the time the cattle were taken from his possession by the writ of replevin.

The plaintiffs denied the modification of the contract.

The real controlling dispute, which was tried, was, whether the contract had been modified as claimed by the defendant, and whether the cattle which died had died in consequence of any neglect or violation of the contract on the part of the defendant.

We contend that this disputed controversy was submitted to the jury fully, fairly and clearly, and as favorably as the plaintiffs could ask.

The Court distinctly charged the jury in the damage case that if the contract had not been modified the plaintiffs were entitled to recover, and this upon the undisputed fact in the case that the cattle had not been increased in average weight 450 pounds per head.

Upon the measure of damages the Court in its charge instructed the jury in behalf of the plaintiffs that in the damage suit the plaintiffs were entitled to recover upon the contract, if the same had not been modified as claimed by the defendant, the difference in value between the cattle replevied weighing on an average 1,470 pounds and and their value weighing on an average 1,276 pounds and were liable for all cattle which died and were not accounted for, or died through defendant's want of ordinary care, valued at the value of a 1,400 pound steer. This was as favorable as the plaintiffs could ask, and they took no exceptions to this part of the charge. (Record 52, pp. 57 and 58.)

And in the damage suit the Court in its charge instructed the jury on behalf of the defendant that if the

written contract was modified, and the defendant complied with the contract as modified, then the plaintiffs were not entitled to recover in the damage suit.

In the replevin case the Court told the jury, that as the ownership of the cattle was not disputed, the question of the right of the plaintiffs to recover depended on whether there was anything due the defendant from the plaintiffs for caring for and feeding the cattle and for advances made for them. (Record 52, p. 50 *supra*, p. 37.) And in this connection the Court further charged that if the 1,500 head of cattle were damaged in value rather than increased by defendant, while the same were in his possession, and nothing was due defendant after allowing and deducting plaintiffs' damages, then the plaintiffs were entitled to a verdict for the cattle and damages for their detention after the 1st of December, 1881. (Record 52 and 57 *supra* 37.)

We repeat that no one reading the entire charge of the Court can fail to conclude that the questions whether the contract was modified and whether the defendant failed to comply with the contract as modified to the damage of the plaintiffs were submitted to the jury under instructions exceedingly favorable to the plaintiffs. The jury found against the plaintiffs on these issues and thus disposed of the damage suit. The meaning of this finding was that the contract originally made had been modified as claimed by the defendant and faithfully carried out as modified. The finding of the jury against the plaintiffs in the damage suit was necessarily and inevitably followed by a finding against them in the replevin suit, for unless the defendant had violated the contract to the damage of the plaintiffs in an amount exceeding what was due the defendant for keeping the cattle and his advances in respect thereof, the replevin suit could not be sustained. In that event the defendant was enti-

tled to the possession of the cattle and had a lien on them for his claim and the right to retain them until his claim was paid.

However, at the time of the trial the case stood in this peculiar attitude: The cattle had been taken from the defendant, turned over to the plaintiffs, and by them sold, and as the defendant had a lien upon the cattle for his claim and the plaintiffs had no claim against the defendant for the violation of the contract, the question was presented to the Court and jury how the defendant's claim should be ascertained and in which suit, the replevin or the damage?

The Court at one place in the charge had stated that the claim of the defendant, if any, should be considered and allowed in the damage suit, but before the charge was concluded the Court modified it by telling the jury that in the event they found against the plaintiffs in the damage suit their verdict should be simply for the defendant, and that in the replevin suit, if they found against the plaintiffs, they should in their verdict assess the value of the property replevied and the defendant's interest therein.

The only interest of the defendant in the cattle was the amount of his claim for caring for them from the time he received them to the time they were taken from him, and the advances he had made upon them.

That the verdict of the jury was intelligently rendered and liberal towards the plaintiffs in view of the testimony is manifest from the fact that a simple computation will show that the amount allowed approximates only 5 cents per pound for the undisputed increased weight of 326 pounds per head on 1,229 cattle and advancements and interest, though the defendant, under the modified contract, ought to have had at least

the actual cost of keeping the cattle after he offered to deliver them, which would have amounted to a much larger sum, as the testimony showed, than represented by the increased weight at 5 cents per pound during the period between the time the plaintiffs ought to have received them and the time they were actually taken from the defendant by the plaintiffs. In this connection we may properly say the verdict awarded by the jury on the theory that the defendant had not violated the contract was approved by the trial judge, or else he would have sustained the motion for a new trial in so far as it claimed the damages to be excessive, or have required the defendant to have entered a *remittitur*.

That the charge of the Court as modified correctly required the defendant's claim to be ascertained by finding his interest in the property in the verdict in the replevin suit is clearly settled by the decisions of the Supreme Court of Missouri.

In *Dilworth vs. McKelvy*, 30 Mo., 149, it was held: Where, in an action for personal property, the plaintiff obtains possession of the property by giving bond, and fails to prosecute the action with effect, and it appears that the defendant has only a special interest in the property *as against the plaintiff*—for example, a lien thereon for money due from the plaintiff to himself, or mere claim to possession for a limited period; in such a case judgment should not be rendered in favor of the defendant for the return of the property or the payment of the entire value of the property, but the value of the interest of the defendant in the property should be assessed, and judgment should be rendered in favor of the defendant for the value so assessed, or the return of the property until such value be paid, at the option of the defendant.

In *Gillaim vs. Kerone*, 45 Mo., 487, *et seq.*, the

Court, speaking of replevin suits and verdicts therein under the practice and law of Missouri, said: "In these suits when the plaintiff gives bond and takes the property, the jury finds a verdict for the defendant for the value of his interest in the property."

This language was used with reference to a replevin suit brought by the owner of the property against one only having a special interest in the property, and in the case cited the Court gave the reason for the rule as that the defendant having only a lien on the property, the plaintiff might, by paying off the amount of the lien, retain the property, and if the plaintiff would tender the defendant the amount of the lien the defendant would have no alternative but to accept the money.

In *Fallon vs. Manning*, 35 Mo., 271, it was held "where property in the possession of a party only having a special interest therein is taken by a stranger to the title in an action of replevin, and plaintiff fails to maintain his action, the defendant is entitled to recover for the full value of the property taken."

Before passing to the consideration of the specific assignments of error, urged by the plaintiffs, we wish this Court's attention directed to the fact that the rights of the parties in these cases now at bar rest and depend on the rules of law governing executed as distinguished from executory contracts.

When these suits were brought the contract was no longer executory. The original purpose of the contract was to provide for the keeping and fattening of the cattle, and their delivery, at the end of the period of bailment, to the plaintiffs. The continuing active executive duties of the contract were to be discharged by the defendant. The plaintiffs were only to receive the cattle and pay for their keeping and the advances on them.

By the replevin suit the plaintiffs secured possession of the cattle without payment, and what is more, before a determination as to what amount, if anything, was due the defendant. The contract having been fully executed when the damage suit was commenced, and being no longer executory, the issues between the parties must be determined from the standpoint of an executed, not an executory contract.

The defendant was entitled to recover for his care of the cattle and advances, and the plaintiffs were entitled to recover for violations of the contract which resulted in substantial damages to them.

The real questions were those of claim on the one side and counter-claim on the other.

Had the defendant been the moving party he could have sued upon the executed contract or in *indebitatus assumpsit*, and rely upon the common counts.

The rule is well stated in the leading case of *Dermott v. Jones*, 2 Wall 1, (9) as follows:

"While a special contract remains executory the plaintiff must sue upon it. When it has been fully executed, according to its terms, and nothing remains to be done but the payment of the price, he may sue on the contract or in *indebitatus assumpsit*, and rely upon the common counts. In either case the contract will determine the rights of the parties. * * * When he has, in good faith fulfilled, but not in the manner or not within the time prescribed by the contract, and the other party has sanctioned or accepted the work, he may recover, as upon the common counts in *indebitatus assumpsit*.

"He must produce the contract upon the trial, and it will be applied as far as it can be traced; but if, by the fault of the defendant, the cost of the work or

materials has been increased, in so far the jury will be warranted in departing from the contract prices. In such cases the defendant is entitled to recoup for the damages he may have sustained by the plaintiff's deviations from the contract, *not induced by himself*, both as to the manner and time of the performance.

"There is great conflict and confusion in the authorities upon this subject.

"The propositions we have laid down are reasonable and just, and they are sustained by a preponderance of the best considered adjudications."

In support of the rule the opinion quoted from cites:

Cutter vs. Powell, 2 Smith's Leading Cases, 1 and notes.

Chitty on Contracts, 612 and notes.

This doctrine when applied to the cases now before the Court results in this: If the contention of the plaintiffs that they were entitled to damages for the alleged violations of the contract on these grounds, namely: (1) That the cattle were not increased, on an average, 450 per head, and (2) That the contract was not modified, as claimed by the defendant, and (3) That the defendant neglected to use the ordinary care required, by the contract, in caring for and feeding the cattle, in consequence of which some of them died—was fully and fairly submitted to the jury, and decided against them,—there can be no prejudicial error in the cases. Owing to the trial of the two cases together the charge of the Court was necessarily long. We submit that an analysis of the charge shows that the theory of the plaintiffs as to their claim for damages was entirely covered.

The Court, as we have heretofore shown, in one part of the charge, said that the defendant's claim, if any,

should be found in the damage suit, but this was afterwards properly corrected, and the jury were told not to consider defendant's claim in the damage suit, but in the replevin suit. From this change in the charge the plaintiffs try to raise the impression that the charge was confused and contradictory. The propriety and legality of assessing the defendant's interest in the replevin suit is strikingly manifest when we consider that only by so doing could he avail himself of the protection of the replevin bond, which stood in place of the property which had been in his possession and on which he had a lien. We shall now proceed to consider the plaintiffs' assignments of error in the order they appear in their brief.

II.

The 1st and 2nd assignments of error are to the refusal of the Court to charge the jury as requested in plaintiffs' first and second instructions, viz.:

"1. If Mr. Bass, the referee named in the contract, which has been read in evidence, determined that the cattle delivered to, and received by Bilby, were, as to flesh and quality, such as Bilby was to have under contract, then Bilby is bound by that determination, unless it has been shown, by the evidence, that Bass, in passing upon the flesh, age and quality of said cattle, was influenced by representations made by the plaintiffs as to their age, flesh and quality, and that such representations were false."

"2. That although the jury may believe, from the evidence, that the cattle received by the defendant were, in fact, thinner in flesh than the lot which had arrived at Council Bluffs, October 17th, 1880, yet, if their condition as to flesh was known to defendant at the time he received them, and that, notwithstanding their condition

as to flesh, he received them under said contract, it is too late now to complain."

These requested but refused instructions relate to the following provision of the original contract, under which the cattle in question were delivered to defendant, viz:

"The cattle delivered to John S. Bilby shall be the same that J. Teal & Co. drove this year from Waco County, Oregon, to Rock Creek, Wyoming Territory, branded with 'T,' on the left side, similar in age, flesh and quality, to a train load that arrived at Council Bluffs, Iowa, on Sunday, Oct. 17th, 1880. W. Bass, of the firm of Rosenbaum, Bass & Co., to be the judge of cattle arriving, whether or not they are an average lot with the train which arrived on Sunday, October 17th, 1880." *Supra* 8.

The part of the Court's charge relating to the effect of Bass' action under this provision (*supra* 42-43) was not excepted to, though part of it is assigned as error in the 7th assignment *post*, and is discussed in plaintiff's argument (par. 1, page 27). The Court said to the jury in substance, that Bass' decision as to the cattle, upon the matter to be determined by him, was binding on the defendant unless the plaintiffs deceived Bass as to the actual condition of the cattle by not putting him into the full possession of their knowledge concerning the condition of the cattle, and that if the cattle were diseased, and such disease could not be discovered by a careful examination, and plaintiffs knew it and did not disclose it to Bass, then Bass' decision could not affect defendant.

The charge of the Court was too favorable to plaintiffs in giving any effect to Bass' decision.

The case could not be affected by what Bass did or failed to do. The rights of the parties could not pos-

sibly have turned on that. The fact that Bass passed the cattle was nothing more than a circumstance, having, perhaps, some bearing on the question of what was the actual, or rather apparent condition of the cattle when he passed them. The defendant received the cattle and the Court charged the jury that, having received them, he was bound to increase their weight 450 pounds each, on an average, unless the original contract was modified, releasing him from that obligation.

We submit that the object of the provision relating to Bass' decision was only to determine whether defendant should take the cattle. The contract was made before the arrival of the cattle, and the defendant agreed to take them if they were an average lot, such as the prior train load, and Bass was to decide that. If defendant had refused to take them at all, then what Bass decided would be material and pertinent in a suit against defendant for damages for not taking them.

This is well illustrated in *Noffsinger v. Ring*, 71 Mo., 149, cited in plaintiffs' brief, where it was held that where property was purchased on condition that same should be first inspected and approved by a third party that there could be a recovery of the purchase price if the property was not accepted upon proof of the inspection and approval.

The defendant was not permitted to recover anything by reason of the cattle not being what it was represented they would be, for his recovery under the charge only embraced his claim for caring and feeding the cattle and advances.

If Bass decided the cattle were an average lot, defendant had to take them, unless plaintiffs, by act of commission or omission, deceived Bass as to their actual condition. But the fact remains, defendant did take

them, and the Court charged that he had to fatten them 450 pounds on an average or pay damages for failure to do so, unless the contract was modified, as claimed by defendant.

III.

The 3rd assignment is that the Court refused to charge the jury as requested in the plaintiffs' ninth instruction, viz:

"3. It was the duty of the defendant, under the written contract in evidence, if the same was not altered, to preserve the hides of all the cattle that died while the cattle were in the custody of the defendant under said contract, until December 1st, 1881, and also the ear marks of all such dying as had ear marks. The hides and ears, if thus preserved, would, however, be evidence of the death of such cattle only, and not of the cause or manner of their death, nor would they show that any such cattle died from causes unavoidable on the part of the defendant.

"But if the jury believe from the evidence that said hides were not preserved by the defendant for exhibition to plaintiffs, December 1st, 1881, and that such preservation and exhibition was not waived by any of the plaintiffs, then the burden is on the defendant to show to the satisfaction of the jury by a preponderance of evidence, both how many of said cattle died and that their deaths resulted from causes unavoidable on the part of the defendant, and for all dying which are not accounted for, defendant is responsible to the plaintiffs."

There is nothing in the contract which required the defendant to preserve the hides till December 1st, 1881. It was sufficient to preserve them a reasonable length of time to enable plaintiffs to examine them and know that

they had actually died. Defendant's testimony proved this to have been done.

IV.

The 4th assignment is that the court refused to charge the jury as requested by the plaintiffs' thirteenth instruction, viz:

"13. The defendant in case No. 409 (now 52) in his answer set up an oral agreement, made and entered into by and between himself and the plaintiffs, on or about the 15th day of December, 1880, by which the defendant claims that the written contract dated November 3rd, 1880, read in evidence, was modified in this, that in consideration of the bad condition of the cattle the time they were received by the defendant under said written contract, and by reason of the bad treatment and the injury done them before they were received by the defendant, it was agreed that the defendant should, in the winter of 1880 and 1881, feed corn to said cattle, and that the time during which he should feed them corn should be deducted from the latter part of the time they were to be kept on full feed of corn under said written contract, and that the defendant was to be discharged from his obligation under his written contract to increase their weight four hundred and fifty pounds each, on an average, if they were left in his custody until December 1st, 1881.

"The Court instructs the jury that before they can believe in the existence of such a new oral contract, all its terms and conditions must be clearly established by a preponderance of evidence on the part of the defendant. Such oral contract must also be founded upon some new and sufficient consideration, and if the jury believe from the evidence after he first received said cattle, failed to feed them on hay, straw and stalk-fields as much as they

could eat, as he bound himself to do by said written contract, and otherwise failed to treat them with ordinary care and prudence whereby the necessity to feed them on corn was brought about by his own wrongful acts, or if he fed them corn merely to supply the deficiency of hay, straw or stalks which he was to feed them, or if he fed them corn of his own volition, for any purpose, and without any express agreement between him and the plaintiffs to feed them corn with a view to change the manner or time of feeding them as fixed by said written contract, then, in either of these cases, the fact that the defendant fed said cattle corn at different times during the winters of 1880 and 1881 would not afford a sufficient consideration for the alteration of said written contract, nor discharge defendant from his obligation to feed them corn as stipulated therein."

The modification of the original contract, as claimed by defendant, was that he should corn feed the cattle in the winter of 1880, instead of feeding them on hay, grass and stalks, and was to be released from increasing their weight on an average 450 pounds, and have the right to deliver them earlier in 1881 than originally provided, and he claimed that he complied with the contract as modified. It matters not who brought about the condition of things which made the corn feeding in 1880 a necessity. The promise for the promise was a good consideration when executed by the party first required to act. As long as a contract remains in part executory and an agreement is made changing its terms and acted upon, that is a consideration sufficient to support the modification of the contract. We need only cite a few authorities on this proposition, and could safely confine ourselves to those cited in plaintiffs' brief.

In Greenleaf on evidence the rule is stated. The author, in speaking of the rule that parol evidence is not

admissible to contradict or vary the terms of a written, says:

"SEC. 303. Neither is the rule infringed by the admission of oral evidence to prove a new and distinct agreement upon a new consideration, whether it be a substitute for the old one or in addition to and beyond it; and if subsequent and involving the same subject matter it is immaterial whether the new agreement be entirely oral, or whether it refers to and partially or totally adopts the provisions of the former contract in writing, provided the old agreement be rescinded and abandoned."

And in the case of *Gross vs. Nugent*, 5 Barn. and Ad. 665, referred to in plaintiffs' brief, the Court states the rule this way:

"After the agreement has been reduced into writing it is competent to the parties, in cases falling within the general rules of the common law, at any time before the breach of it by a new contract not in writing, either altogether to waive, dissolve or annul the former agreement, or in any manner to add to or to subtract from or vary or qualify the terms of it, and thus make a new contract."

In the cases at bar the undisputed testimony showed that if the contract of modification was made, as claimed by the defendant, it was based upon a sufficient consideration.

While his bailment existed and was going on the modified agreement was made and carried out.

The Court distinctly told the jury that the burden was on defendant to show that the original agreement was changed and the modified agreement carried out by the defendant. (*Supra* 46.)

If the agreement was modified and executed, as

modified by the defendant, such execution is ample consideration to support the modified agreement.

In *Emmon vs. Slater*, 22 Howard 43, cited by plaintiffs, the Court, in the opinion, speaking of the consideration which will support a contract, said:

"Nothing is better settled than the rule, that if there is a benefit to the defendant and a loss to the plaintiff, consequential upon and directly resulting from the defendant's promise, in behalf of the plaintiff, there is a sufficient consideration, moving from plaintiff, to enable the latter to maintain an action, upon the promise, to recover compensation."

2 Addison on Contracts, 1002 and cases cited.

"Other authorities state the proposition much stronger, authorizing the conclusion that benefit to the party by whom the promise is made, or to a third party, at his instance, or damage sustained at the instance of the party promising, by the party in whose favor the promise is made, is sufficient to constitute a good and valid consideration on which to maintain an action."

Violet vs. Patton, 5 Cr., p. 150.
Chitty on Contracts, p. 28.
Townsley vs. Sunnall, 2 Pet., p. 182.

V.

The fifth assignment (plaintiffs' brief, p. 19) is to the refusal of the Court to give the 14th instruction, given by the plaintiff:

"The jury are the sole judges of the weight of the evidence and of the credibility of the witnesses, and may give the testimony of every witness such weight as they may deem it entitled to, *and if they believe that any witness has wilfully testified falsely to any material fact in contro-*

versy on the trial of this case, they are at liberty to disre-the whole of the testimony of such a witness."

A large part of the plaintiffs' argument, paragraph fifth thereof, pp. 35 to 41, is devoted to this assigned error, and quite an array of authorities referred to. The Court will observe that this instruction was asked as an entirety. There would, perhaps, have been no impropriety in the Court below giving the first part of this instruction to the effect that the jury were the judges as to the credibility of witnesses, although from the tenor of the charge the jury could not but have been advised that such was their prerogative. The last part of the requested instruction relating to the right of the jury to reject the testimony of a witness, who had wilfully sworn falsely to any material fact, could not have been rightfully given.

There is nothing in the record tending to show that any witness had wilfully sworn falsely to any material fact, and there is nothing in the record tending to show what contradiction of the testimony of any witness was made by other witnesses. We have examined the cases cited in the plaintiffs' brief and we do not find any case where it was held that such an instruction should have been given unless it appeared from the record that the facts in evidence authorized or made it pertinent. For instance in the cases, *Gillet vs. Winer*, 23 Mo., 76, and *State vs. Dwire*, 25 Mo., 553, referred to in the plaintiffs' brief, the Court distinctly asserted the proposition that the instruction is proper "*where the facts in evidence will warrant it.*" In both cases the record disclosed the testimony of a witness to which the instruction related and a contradiction thereof by other witnesses, and the holding of the court was that the instruction as applied to the facts in those cases did not assert a mere abstraction but was warranted by the evidence.

In *White vs. Maxcy*, 64 Mo., 552, (559, 590), the Court laid down the rule in most emphatic terms that a similar instruction to that requested by the plaintiff should not be given as a mere abstraction, but only when justified by the evidence.

We quote from the opinion of the Court:

"The fifth instruction asked by the defendant, to the effect that the jury might disregard the testimony of any witness who, in their opinion, had wilfully sworn falsely, was undoubtedly correct as an abstract proposition, *but this Court has never held that such instrctions should always be given under all circumstances. Such instruction is always calculated to intimate that, in the opinion of the Court trying the case, some of the witnesses had testified falsely, and the Court presiding at the trial is better qualified than we are to determine the propriety of giving or refusing such an instruction. Upon reading over the record, we are unable to perceive any ground for asking the instruction in the present case.*"

In our case the learned Judge who presided at the trial, before he could give the instruction requested, must have been satisfied that there was evidence justifying and authorizing it. He heard the testimony, looked upon the witnesses as they testified and refused the instruction, and the legal presumption is that his refusal was justified by the state of the evidence, and the record does not in any part rebut this presumption. It appears from the record that there was conflicting testimony, but it does not appear between what witnesses, and what is more to the purpose, there is nothing in the record tending to show that any witness had testified falsely, much less wilfully falsely.

In *Iron Mountain Bank vs. Murdock*, 66 Mo., 70, the court held that an instruction that the jury may disregard the testimony of a witness who had sworn falsely

should not be given, for they cannot reject his evidence unless they believe that he has knowingly testified to an untruth.

VI.

The 6th assignment (*supra* 35), and the argument in support thereof (par. 6), are hypercritical. Perhaps we ought to pass them by without comment. The Court in the stating part of the charge, wherein the undisputed facts were being narrated, simply told the jury that "*The cattle as they arrived at Dawsonville were unloaded, taken care of and driven to the farm of Bilby as testified to.*" The Court did not pretend to say they were well taken care of or taken care of as provided by the contract, but those questions were all left to the jury in appropriate instructions not excepted to. The language of the charge is "were taken care of as testified to." This the record proves to be indisputably true. While there may have been a conflict in the testimony whether Bilby used ordinary care, or the care required by the written contract, in taking them from the railroad station to his farm, it is beyond dispute that he did receive them at the railroad station, assumed charge of them and took them to his farm and kept possession of them until plaintiffs replevied them. And this is all that this part of the charge was intended to or did say.

VII.

The 7th assignment (plaintiffs' brief, p. 19) was not excepted to and cannot be considered (*supra* 51). It was, however, as favorable as the plaintiffs were entitled to upon the question of the effect of Bass' decision that the cattle were an average lot to the load which arrived at Council Bluffs October 17th, 1880. In considering the 1st and 2d assignments *(supra)* we have expressed

our views as to the only purpose of the provision of the contract relating to the matter to be decided by Bass, and we are entirely content to submit this assignment if it is to be considered upon what we there said.

VIII.

The 8th assignment (*supra* 45) is only excepted to in argument (see paragraph 10 of plaintiffs' argument) as to the following clause:

"Bilby was bound to take reasonable care of the cattle with reference to the condition in which he took them. What is 'reasonable care' under the circumstances testified to, you are the judge of. If he did not take such reasonable care, and any of the cattle died in consequence, he is responsible for them to the plaintiff."

This part of the charge, like all the other parts to which the assignments relate, must be taken in connection with what precedes and follows. The undisputed testimony shows that the defendant did not take care of the cattle in the precise way provided for by the original written contract.

The Court in other parts of the charge told the jury that if the original contract was not modified, the plaintiffs were entitled to recover for the difference between the actual weight of the cattle and their weight if they had been increased on an average 450 pounds. (*Supra* 50.)

It was certainly proper for the Court to instruct the jury as it did in the assignment complained of with reference to the care required of the defendant in dealing with the cattle. The meaning of this part of the charge was, that although the contract was modified, the defendant was still required to take reasonable care of the cattle.

It may be further said that this part of the instruction related specially to the question of the responsibility of the defendant for the cattle which had died. As we shall see, the contract expressly provided that defendant was only to be responsible in case of the death of the cattle through his negligence.

IX.

The part of the charge complained of in the 9th asssignment (*supra* 46), when read in connection with the parts of the charge immediately proceeding and following it, was certainly unobjectionable. The Court had the right to array the testimony on the question of the alleged modificatian of the contract, and to comment on it. The part of the charge does not, as we read it, assume to prove or take from the jury any disputed fact.

X.

The 10th assignment relates to a part of that part of the charge bearing on the attempted impeachment of the defendant. Here is all that the charge says on this question, and it should all be read and construed together:

"Regarding the attempt to impeach the character of Bilby for truth, veracity, honesty, and fair dealing, it may be remarked that the plaintiffs had a right to show that Bilby, who testified in the case, could not be believed on oath. It is usual when such attempts are made to stop here, but the plaintiffs went further and undertook to show also that he, Bilby, is dishonest. How he, Bilby, met these charges you heard, and are able to determine the question whether his testimony shall be affected thereby. While this far everything is legitimate and proper, there is one view against which I

warn you. This view is that the attempt to attack the honesty of Bilby should not be allowed to affect your mind, if at all, further than as related to this case. A man suing another must have a good cause of action. He cannot turn around and say that I have no cause of action, yet you are a rascal, and therefore I am entitled to receive a judgment, and to take your property to satisfy it. What is intended by this allusion to the attempt to impeach is to direct your mind to the proper application of the testimony."

The plaintiffs assign no error for the refusal of instructions on this branch of the case.

We have no comment to make on this assignment or the plaintiffs' argument in support thereof, than that the part of the charge above quoted, which includes the assigned error, asserts a correct and wholesome rule of law, in striking and vigorous language.

XI.

The 11th assignment covers portions of the charge widely separated and in no way connected, (*supra*, 37, 38, 44).

Only the first part of the assignment (*supra*, 37 and 38) is argued in par. 7, pp. 42 and 43, of plaintiffs' brief. This portion of the charge must be considered in connection with the assigned errors, 14 and 15, hereinafter referred to, and argued by us in treating of the plaintiffs' argument relative thereto. The part of the charge, covered by the 11th assignment, was, in what may be termed the stating part of the charge wherein the ultimate legal questions in the case are stated, and the Court, in passing, says to the jury that the ownership of the cattle being undisputed, the question of who was entitled to their possession depended on whether anything

was due to defendant on account of keeping and feeding the cattle, and for advances. The subsequent portions of the charge, as we shall see when we come to consider the 14th and 15th assignments, told the jury that if plaintiffs' damage exceeded defendant's claim the plaintiff could recover in the replevin suit.

XII.

Supra 44

The 12th assigned error, discussed in par. 8 of plaintiffs' argument, is to that part of the charge wherein the Court said that the provisions of the written contract as to wintering the cattle well on hay, straw and stalk fields were to receive a reasonable construction, and that the plaintiffs could not complain of the feeding the cattle on grass, dry or green, or corn even, or partly substituting such food for the food named in the contract, provided the cattle were kept in reasonably good condition. In other words the Court told the jury if there was a change of food which did not injure the cattle the plaintiffs cannot complain. The contract of caring for and feeding the cattle having been executed, the plaintiffs could not recover for any variance from the terms of the contract in the methods of caring for and feeding the cattle, unless by such deviations the cattle were injured. The charge throughout is specially clear and pointed to the effect that if the contract as it existed between plaintiffs and defendant was not complied with, and in consequence the cattle were injured or died, then the defendant was liable. There was no testimony in the case tending to prove that the cattle were injured in consequence of receiving grass, dry or green, or corn, as a substitute for hay, straw and stalk fields.

XIII.

The 13th assignment (*supra* 45) is to that part of

the charge wherein the Court instructed the jury that as to the cattle which died Bilby was required to exercise ordinary care, and if any died in consequence of his failure to do so he was liable therefor.

Plaintiffs' objections are elaborately argued in their argument, par. 10 pp. 45 to 48. They seem to forget that this portion of the charge related only to the defendant's liability for the cattle which died in his possession. They overlook the specific and pointed provision of the contract that "Bilby is to be responsible for all cattle lost, strayed or stolen, *and for any dying through the neglect and carelessness of the said John S. Bilby;* any dying through unavoidable causes shall be shared thus: J. Teal & Co. to bear the loss of the steers and John S. Bilby the feed." The charge only tells the jury that as to the dead cattle Bilby was required to exercise reasonable care, and that was all his contract required.

XIV.

The 14th and 15th assignments (*supra* 48 and 49) are considered in par. 11 of plaintiffs' argument.

The criticism on these parts of the charge are that they refer to the damages only to the 1,229 head of cattle replevied, and not to the damages to the 1,500 head delivered to defendant. A reference to the part of the charge immediately preceding the parts assigned as error show that in this claim plaintiffs' counsel are in error.

The preceding part of the charge referred to, speaks of the entire lot of 1,500 head of cattle which were sued for in the petition. (*Supra* 48.)

The petition had sued for the 1,500 head. The Court was speaking of the entire lot received by defendant and of the damage to the whole. In the light of the entire charge it is plain that the Court here only said that if the

plaintiffs' damages exceeded the defendant's claim, then the plaintiffs could recover in the replevin suit, but on the other hand, if defendant's claim exceeds plaintiffs' damages, then the verdict in the replevin suit must be for the defendant. In other words the replevin suit could not be sustained if, after allowing plaintiffs' damages, if any, there was something due defendant for keeping the cattle and for advances.

But if, as we claim, the Court fully and fairly instructed the jury in other portions of the charge on the question of plaintiffs' claim for damages and his right to recover the same in the damage suit, and the jury found that plaintiffs had sustained no damages, how can these assigned errors avail the plaintiffs ? The errors, if any, which we deny, are without prejudice. If the jury had found for the plaintiffs in the damage suit to an amount exceeding the interest of the defendant in the property as found in the replevin suit, then the Court might be required to scrutinize these assigned errors more closely to see whether the jury had been misled in the replevin suit, and whether their verdict in that suit was right.

XV.

The 16th assignment is to that part of the charge wherein the Court modifies the instructions which he had previously given. The modification of the instructions was to this effect: That if the jury found the issue in the replevin suit for the defendant, they should assess the value of the cattle taken by the plaintiffs and the amount of the defendant's interest in the cattle. And further, that if the jury found the issue in the damage suit for the defendant, they would simply say so in their verdict. In other words, the instructions as modified preclude the defendant from recovering anything in the damage suit,

and left his only remedy to be the ascertainment of his claim in the replevin suit by finding therein of the amount of his interest in the cattle.

The instructions were modified only as they bore on the defendant's claim, and did not affect in any way the previous part of the charge relating the plaintiffs' claim.

XVI.

The 17th assignment relates to the action of the court below in refusing to permit the deposition of one Wood as to the sale of the cattle in question at Chicago in December, 1881, several days after they had been taken from the defendant. We submit that it would not have been competent to have proved the market value in Chicago if the day the cattle were taken from defendant there was a market value for the cattle at the place where they were taken. Certainly it was not competent to prove their market value at Chicago as evidenced by the sale of them several days after they had been taken from the defendant, and specially where there was no specific proof that the cattle were in the same condition when sold as when taken from defendant.

But the rejection of this testimony could not have practically affected the result in these cases, for this reason: It was entirely undisputed that the aggregate value of the cattle taken exceeded largely the value of the defendant's claim, and the jury so found. It was entirely immaterial, so far as plaintiffs' rights were concerned, what the value of the cattle were when taken if that value exceeded (as it indisputably did) the amount of the defendant's claim.

XVII.

We cannot finally pass from the consideration of

these cases without reasserting that taking the whole record, it is quite apparent that the plaintiffs had a fair trial, and the result reached through the verdict of the jury and the judgment of the Court attains the ends of justice.

It appears from the record that one of the plaintiffs was with these cattle on the farm of the defendant substantially all the time that they were in the defendant's charge, and that he never made any complaint as to the treatment that the cattle received from the defendant (*supra* 25). The cattle had been brought all the way from Oregon, partly driven and partly by rail, and were in poorer flesh than the sample lot which defendant had seen before making the contract.

It was a bold move on the part of the plaintiffs to bring the replevin suit without tendering defendant anything for the care he had given the cattle. The replevin suit was promptly followed by the suit sounding for heavy damages. The plaintiffs had no standing in court in either suit unless they had been damaged by defendant's violation of the contract under which he held the cattle. The charge of the Court, in its full scope and purport, was as favorable as the plaintiffs could ask as to whether the defendant was liable. The jury found that the defendant was entirely free from fault, and was not liable; and having so found, ascertained defendant's claim in their verdict in the replevin suit, and for that, judgment was awarded.

We submit that there can be no reversal in this case unless the plaintiffs can show upon the record substantial error at the trial resulting to their prejudice, and this we contend they have not and cannot do.

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